In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1522

CECIL D. ANDRUS, Secretary of The Interior,

Petitioner,

v.

STATE OF UTAH,

Respondent.

BRIEF BY THE STATE OF UTAH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 18, 1979

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INTRODUCTION

The Secretary of the Interior has petitioned this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this case, which involves certain school indemnity selections filed by the State of Utah.

The State of Utah concurs in the statements by the Secretary with respect to "Jurisdiction" and "Statutes Involved" (pp. 2-3 of Secretary's petition), but disagrees that this is an appropriate case for certiorari.

The real question in this case is whether Congress has conferred on the States the *right to select* unappropriated federal mineral land as indemnity for lost mineral school sections in place, or whether Congress has given the Secretary of Interior unbridled discretion to approve or reject such selections for whatever reasons he deems appropriate. Utah contends that this Court has clearly held that the right of selection is in the States, and that the Secretary has no discretionary authority beyond that of making an administrative adjudication to determine whether the selections are in accordance with the criteria set forth in the school indemnity selection statute, 43 U.S.C. 852. *Wyoming v. United States*, 255 U.S. 480 (1921); *Payne v. New Mexico*, 255 U.S. 367 (1921).[1]

The decision by the court below is reported at 586 F.2d 756 (1978), and a copy is attached to the Secretary's petition as Appendix B, pp. 10a-53a.

This brief might appear to be unusually long for a response to a petition for certiorari. But, if so, such an appearance is somewhat deceptive because points I and II of the Argument, at pages 7-46, are designed to be

[1] **Referring to the Wyoming and Payne cases, the lower court concluded ". . . we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah." (Secretary's petition, p. 41a).**

a complete response to the Secretary's petition. Point III of the Argument, entitled "The Decision by the Court Below is Clearly Correct," and constituting pages 46-104 of this brief, is essentially an argument on the merits of the controversy, and constitutes a reference for whatever selective review the Court might wish to make of that material.

While points I and II are intended to show that there is no persuasive reason for granting a writ of certiorari, point III is intended to demonstrate that there is no conceivable merit to the Secretary's position on the "federal questions" he desires this Court to review. Utah realizes that this Court does not decide the "merits" of a case when it decides whether certiorari should be granted, but if one who petitions for certiorari presents a patently unsound argument with respect to a federal question which it asks this Court to review, then this Court ought not grant certiorari.

Utah firmly believes that is the case here. So did the trial court. And so did the lower court. The unanimous and painstaking decision by the Court of Appeals clearly illustrates a degree of impatience by the court with what it deemed to be far-fetched and irrational arguments by the Secretary.

Utah is concerned primarily about additional delays in obtaining its school indemnity lands. It has been nearly fourteen years since Utah filed the first selections that are the subject of this action, and the Secretary has not yet acted on any of the selections. If the decision of the court below is permitted to stand, the mat-

ter will merely return to the Secretary for an administrative adjudication of the selection lists under the school indemnity statute (43 U.S.C. 852). No one knows how long that will take. And a writ of certiorari by this Court would only add to the delay. Therefore, point III of the Argument has been included to allow this Court to pick and choose for review any parts of it deemed necessary to dispel any doubt that the Secretary's arguments do not have sufficient merit to present a question worthy of review.

SUMMARY OF CONFLICT IN COURT BELOW

I. *POSITION OF UTAH*

Utah argued that federal land grants to the States for the support of the common schools created a solemn public trust of critical importance for the support of public schools. This trust was in the nature of a bilateral compact whereby Utah, as a sovereign State admitted into the Union on an equal footing with the Original States, agreed not to tax federal lands within Utah, and whereby the United States, for its part, granted four sections of federal lands within each township to Utah for the aid and support of the public schools, thus compensating Utah for the limited and reduced property tax base available to raise revenues to support governmental functions (specifically, the operation and maintenance of the public school system).

By clear and unambiguous legislation, Congress not only granted and appropriated lands for the original school sections in place, but further provided that whenever title to any such school section did not pass to Utah because of federal pre-emption or private entry prior to survey, Utah could select, at its option, an equal acreage of unappropriated federal lands. The congressional grant was in the nature of an offer which Utah could accept or exercise at its election and discretion; and, when so exercised through the filing of school indemnity selection lists, the Secretary of Interior is obligated by law to conduct an administrative adjudication to determine whether such indemnity selections are in compliance with the enabling act and the statutory criteria set forth by Congress in 43 U.S.C. 852.

If there is such compliance, Utah receives equitable title to the selected lands as of the date that the respective indemnity selection lists were filed, and the Secretary must approve such selections by issuing what is commonly referred to as a "clear list," and legal title thereupon vests in Utah. If the selection lists are not in compliance with the applicable statutory criteria, equitable title does not vest in the State by virtue of filing such selections, and the Secretary is obligated to reject such selections.

II. *POSITION OF THE SECRETARY OF INTERIOR*

The Secretary did not dispute or deny the legal arguments of Utah under the school indemnity selection statutes, but claimed that he had separate and independent authority under Section 7 of the Taylor Graz-

ing Act, 43 U.S.C. 315f, to "classify" all lands within a grazing district to determine whether they are suitable for school indemnity selections. This "classification" is necessary, claims the Secretary, in order to unlock the selected land from the withdrawal effected by Executive Order No. 6910, issued by President Roosevelt in 1934. The Secretary further claimed that he had a very broad range of discretion in making such a classification, and that he is authorized to consider a wide range of public interest factors including the comparative values of the base school lands and the selected indemnity lands, and to classify the land for retention in federal ownership if in his personal view he does not think the public interest would be served by allowing title to pass to the State.

III. *DECISION OF THE COURT BELOW*

The United States Court of Appeals for the Tenth Circuit held that the Secretary's arguments were based on a strained and wholly irrational construction of a 1936 Amendment to the Taylor Grazing Act and Executive Order No. 6910 as his source of authority for frustrating the clear mandate of Congress under the school indemnity selection statutes, concluding that there is absolutely no indication in the legislative history of the Taylor Grazing Act, or in the act itself, that Congress intended to require or authorize "classification" under Section 7 as a condition to a State's exercise of its school indemnity selection rights. The Tenth Circuit Court also noted that this Court has clearly held that school indemnity selection rights are to be

exercised in the discretion of the States—not the Secretary of Interior. By contrast, the Secretary cited no case in any jurisdiction that has ever held that the classification procedures of the Taylor Grazing Act apply to school indemnity selections; and the Secretary has also admitted that he has *never* applied the "comparative value" criterion to school indemnity selections, although he now desires to apply such a criterion to Utah's school indemnity selections.

The court below also noted that this Court held in *Wyoming v. United States, supra,* that the very act of *filing* the school indemnity selection lists operates as a release, waiver and relinquishment by the State of any further claim to the original school sections in place, and the State receives in lieu thereof equitable title to the selected lands. This is a form of equitable conversion, because the filing of the selection lists results in a simultaneous payment in full to the United States for the selected lands, and no other or further act is required by the State to complete the transaction. The only remaining act is the administrative adjudication to be conducted by the Secretary of Interior.

ARGUMENT:

REASONS FOR DENYING THE WRIT

I. *FAILURE TO STATE A JURISDICTIONAL BASIS FOR A WRIT OF CERTIORARI*

Part V of the Rules of this Court deals with jurisdiction on writ of certiorari. Rule 19 thereunder spec-

ifies considerations governing review on certiorari. While the rule declares that the considerations therein enumerated neither control nor fully measure the Court's discretion, it does make clear that those considerations indicate the character of the reasons that will be considered.

But the Secretary has not even come close to stating a reason for certiorari that is of the nature or character of the considerations specified in the rule. The only argument advanced by the Secretary is that the decision by the court below was in error on a question of federal law. Presumably, this is an effort to bring the Secretary's petition within that part of Rule 19(b) that provides that a writ of certiorari might be granted where a court of appeals "has decided an important question of federal law which has not been, but should be, settled by this court. . . ."

But even this effort is highly suspect—for at least five reasons. First, this Court has already decided the nature, measure and extent of school indemnity selection rights by the States in *Wyoming v. United States* and *Payne v. New Mexico*, both *supra*. And the decision by the court below was in exact accordance with those decisions.

Second, the Secretary now endeavors to create a "new" federal question by arguing that Section 7 of the Taylor Grazing Act (43 U.S.C. 315f), coupled with Executive Order No. 6910, modified the school indemnity selection statute (43 U.S.C. 852) and rendered the

Wyoming and *Payne* cases inapplicable to the present controversy. But the Taylor Grazing Act, on its face, does not apply to school indemnity selections, and the legislative history of that act, as shall be seen, makes it entirely clear that the act was not intended to apply to school indemnity selections, nor was Executive Order No. 6910. The court below so held, and found that there was no ambiguity in that act or executive order to leave room for contrary administrative interpretation by the Secretary. Thus, the Secretary's contention that his administrative view of the Taylor Grazing Act is a new federal question is, at best, dubious.

Third, the Secretary's effort to bootstrap his administrative interpretation of the statute to the status of an "important question of federal law" under Rule 19(b) must fall by virtue of a fatal internal conflict and inconsistency in his very argument. This is so because, on the one hand, the Secretary argues that on several occasions over a period of approximately forty years he has interpreted Section 7 of the Taylor Grazing Act and Executive Order No. 6910 as requiring classification of lands by him prior to their availability for selection as school indemnity lands by the States. He further argues that Congress has acquiesced in his interpretation. That argument will be responded to later in this brief, but, for now, it is sufficient to observe that the Secretary has, for more than thirty years, also taken the view that school indemnity selections must be on an acre-for-acre basis, and that comparative value of base lands and selected lands is not a relevant consideration. And, as shall be seen, this view was not only ac-

quiesced in by Congress, but Congress refused to approve a comparative value criterion when the Secretary requested it by way of new legislation. Thus, if it were to be assumed, *arguendo*, that there were any merit to the Secretary's claim of a long-standing administrative interpretation that "classification" under Section 7 was a prerequisite to school indemnity selection, then there would be equal merit to holding the Secretary to his long-standing interpretation that equal acreage, and not comparative value, is the basis for school indemnity selections.

In this regard, it is interesting to note that before the lower court the Secretary combined as a single issue what he now sets forth as two separate issues at page 2 of his petition before this Court. Before the Circuit Court, at pages 2-3 of his primary brief, the Secretary stated the issue as:

> Whether the Secretary may exercise the "discretion" granted to him by Section 7 of the Taylor Grazing Act (43 U.S.C. sec. 315f) to classify the 194 selected parcels either for disposal to the State or for retention by the United States on the basis of comparative market value between the selected land and the "base" land they replace.

Thus, in the court below, the Secretary's sole desire was to implement, for the first time ever, a comparative value criterion, and to grasp at Section 7 of the Taylor Grazing Act, in tandem with Executive Order No. 6910, as the vehicle for doing so. It seems to be rather specious for the Secretary to search for an

important federal question based on a long-standing but unfounded administrative interpretation of the Taylor Grazing Act and Executive Order No. 6910 to support the introduction of an entirely new "value" criterion to frustrate the express provisions of the school indemnity selection statute.

Fourth, the Secretary seeks to capture the attention and sympathy of this Court by claiming that the decision below "will have a severe disruptive effect on the management of the public domain." (Secretary's petition, p. 10). This claim would seem to be quite beside the point since Congress has declared the policies and procedures to be followed in school indemnity selections. But, beyond that, the Secretary overstates the potential impact of school indemnity selections on management of the public domain.

In footnote 9 at page 12 of his petition, the Secretary claims that there is a total of 643,000 acres of outstanding school indemnity selection rights held by seven States. This is less than one-tenth of one percent of the federal land. See *One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission*, p. x, 1970. Utah is listed in said footnote 9 as having 225,000 acres—which assumes that none of Utah's present selections are valid. Even so, 225,000 acres represents only slightly more than one-half of one percent of the federal land in Utah—the Federal Government still owns two-thirds of the State. (*One Third of the Nation's Land, supra, p.* 327). It is unlikely that honoring school in-

demnity selection rights will have a "severe disruptive effect on the management of the public domain" in Utah or any other State.[2]

[2] There is some question as to whether this claim is really a serious concern of the Secretary or merely an argument of the Solicitor General. Utah has been informed, and believes, that the Secretary of the Interior evaluated the potential impact of outstanding school indemnity selections (by the seven States having such outstanding school indemnity selection rights) on federal management of the public domain and was content to live with and abide by the decision of the lower court.

It seems only fair to point out that Utah has been more than cooperative in meeting with representatives of the Department of Interior to identify lands for school indemnity selection that would permit effective land management by both the State and the Department of the Interior. In fact, the Department recommended the areas selected by the State. It also seems appropriate to point out why Utah waited nearly ten years after filing its first selections before bringing this lawsuit. These two matters were clearly explained in the affidavit of Charles R. Hansen, Director of the Utah Division of State Lands, filed in support of Utah's motion for summary judgment—and not controverted in any way by the Secretary of Interior. This affidavit was part of the record before the Tenth Circuit Court, and its pertinent parts are as follows:

> CHARLES R. HANSEN, first being duly sworn upon oath, deposes and says that he is the Director of the Division of State Lands of the State of Utah, and that:
>
> 1. During numerous meetings between 1966 and 1974 between representatives of the Utah Division of State Lands and representatives of the office of the State Director of the Bureau of Land Management, held to discuss the adequacy and status of Utah's oil shale selections as indemnity for lost school lands (which are the subject of the present litigation), Utah was advised that there was no objection or question on the part of the Federal Government with respect to whether such selections were in compliance with all statutory and regulatory requirements pertaining thereto, with the exception of the advisability of the State of Utah making selections which would constitute "manageable blocks" of land, and in this regard Utah did thereafter file such selections in such a manner as to satisfy all suggestions offered by the Bureau of Land Management. The final suggestions by the Bureau in this regard were explained in a meeting held December 19, 1968, attended by myself and members of my staff as representatives of the State of Utah and by Mr. Robert D. Nielsen, as the State Director of the Bureau of Land Management, and members of

Fifth, the Secretary again endeavors to alarm the Court by advising that the decision below "will prove quite costly to the United States." (Secretary's petition, p. 10). To reinforce this notion the Secretary advises that Colorado "presumably" will now be able to select the lands in that State on which prototype oil shale leases have been issued and where the lessees are obligated to pay $328 million in bonus payments. (Secretary's petition, pp. 10-11, and footnote 7 on page 11). This is highly misleading.

Under the clear holding of the court below, no rights attach on the part of a selecting State prior to

[2] **Continued**

> his staff as representatives of the Bureau of Land Management. The suggestions offered by the Bureau were formally approved by the Utah Board of State Lands on January 15, 1969, and in compliance therewith Utah subsequently prepared and filed the selection lists dated December 19, 1969 (25,583.20 acres), February 17, 1970 (38,058.81 acres), November 8, 1971 (11,044.87 acres), November 15, 1971 (11,977.49 acres), and November 19, 1971 (12,216.59 acres), and this brought the total pending state selections on oil shale lands to 157,255.90 acres.
>
> 2. On numerous occasions I have discussed the status of these pending applications with appropriate representatives of the Federal Government, including discussions with Harrison Loesch, former Assistant Secretary of Interior, and with Reid Stone, Federal Oil Shale Coordinator, and on each occasion I was advised that federal action on the State selections was awaiting development of the Federal proto-type program for oil shale leasing, and that as soon as that program was developed to the point that the Federal Government was ready to issue the original leases, they believed that the selection lists as filed by Utah would be approved and clear lists issued. It was not until February 14, 1974, that Secretary Rogers Morton formally advised Governor Calvin Rampton that the Department of Interior intended to apply a comparative value test to determine whether the oil shale lands selected had substantially more value than the base lands for which selection was made.

the date of selection, and Colorado has not selected any lands subject to prototype leases. The Colorado lessees have already paid to the United States the full amount of the bonus bid required to be paid in cash (60%); the remaining amount (40%) may be credited against development costs, as provided in the leases. Thus, if Colorado could select those lands at all—and there is some question if it could—the selection would not be effective until the termination of the existing leases, and the State would not directly receive any of the lease revenues.

Moreover, there is no evidence that oil shale lands are more valuable than the original grants in place. While there has been an interest in oil shale development for more than sixty years, the fact is that not one gallon of shale oil has yet been produced at a profit, and there is no assurance that one ever will be. On the other hand, land appropriated in Utah before statehood and survey (where Utah was denied title) includes some of Utah's most valuable metals and hydrocarbons.

This, of course, is beside the point to the extent that the legal question is merely whether the Secretary is authorized to compare values, and he has not yet done that. But the Secretary repeatedly speaks, in his petition, of the huge, unconscionable windfall that would accrue to Utah if the current selections are honored. These assertions reveal a serious lack of knowledge on the part of the Secretary concerning history and geography. The plain fact is that Utah has no

chance of receiving school lands having value anywhere near the value of the original grants in place.[3]

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[3] History records a long and arduous effort by Utah to try to obtain its school land grants—including grants in place as well as indemnity selections. This litigation is just one more chapter in that effort.

A brief historic summary of this effort will be illustrative. The school land grant contained in Utah's Enabling Act was silent as to whether the grant included mineral lands. The enabling acts of most other "public land" States expressly excluded mineral lands from the school land grants, and this Court held in **United States v. Sweet**, 245 U.S. 563 (1918), that the same was true with respect to Utah, explaining that lands "known" to be valuable for minerals **at the time title otherwise would vest in the State** were excluded from the grant. This Court thus followed the earlier lead of **Ivanhoe Mining Co. v. Keystone Consolidated Mining Co.**, 102 U.S. 167 (1880) and **Deffeback v. Hawke**, 115 U.S. 392 (1885). In the latter case this Court explained:

> We say "land **known** at the time to be **valuable**," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. . . . We also say lands **known** at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which years afterwards rich deposits may be discovered. . . . (115 U.S. at 404).

Despite the **Sweet** decision, the Department of Interior refused to recognize state title to many school land grants in place even though those lands were not "known" to be valuable for minerals. This was accomplished through an administrative doctrine devised by the U.S.G.S. within the Department and known as "geologic inference," which was nothing more than geologic speculation. Under this doctrine States were denied title to school sections in place if it could be **assumed, inferred** or **believed** that a school section **might** have mineral value by virtue of the fact that other lands in the area were "known" to have mineral value. Thus, if **other lands** were known to have mineral value, a "geologic inference" could be drawn that the school section also might have mineral value.

This doctrine caused Nevada and Utah, with support from other Western States, to go to Congress for relief, and that relief came in the Act of January 25, 1927, 44 Stat. 1026, 43 U.S.C. 870-871.

Utah, Arizona and New Mexico were granted four sections in each township, rather than the traditional two, because of their large areas of arid, barren desert. Title could not pass until the lands were surveyed. Surveys were delayed, and, in the meantime, the Federal Government reserved the choice areas for national parks (Utah has five national parks, which is more than any other State), national forests, reservoir sites, and other purposes. Lands that were near streams, or that were susceptible to irrigation or other development, were

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[3] **Continued**

And, of course, the States could not select mineral lands as indemnity, even though the lost base lands were mineral, until 1958, when Congress amended 43 U.S.C. 852 by the Act of August 27, 1958, 72 Stat. 928.

The present litigation was prompted by the Secretary's recent effort to frustrate Utah's rights under the 1958 amendment by seeking to reject all school indemnity selections which the Secretary believes are more valuable than the base lands in place for which the selections are made.

And there is yet another area where the Government has seriously short-changed Utah in its school land grant. Utah's Enabling Act granted to Utah school trust lands consisting not only of sections 2, 16, 32 and 36 in each township (Section 6 of the Act of July 16, 1894, 28 Stat. 107), but also 5% of the proceeds derived from the sale of all of the remaining federal land within the State (Section 9 of the Act of July 16, 1894, 28 Stat. 107). Congressional policy later changed to one of retaining federal lands in federal ownership, and the Government has thus retained ownership of two-thirds of all of the land within the State of Utah. But in 1894, when Utah's Enabling Act was passed, the congressional policy was one of disposing of the public domain, and it was reasonable for Utah to assume that it would actually receive the entire school land grant specifically and clearly established by the "bilateral compact" between Utah and the United States. Since the United States still owns 35,060,194 acres in Utah (One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission, p. 327, 1970), this means that Utah's permanent school fund has been denied the proceeds that would have been derived from the sale of 1,753,010 acres of such federal land (the 5% granted by Section 9 of the Enabling Act).

taken by private entry. Thus, by and large, when surveys were completed the school lands in place received by Utah were the remote and barren lands that nobody wanted, ordinarily having no value except for marginal grazing. True, Utah could select indemnity lands for those school sections lost by pre-emption and reservation, but Utah could only select from the remaining "unappropriated" barren desert. Furthermore, prior to 1958 Utah could not even select "mineral" lands in the desert, even though its base lands were mineral.

The basic federal purpose in granting to Utah sections 2, 16, 32 and 36 in each township was to give the State a balanced and representative ownership on a statewide basis. This basic federal policy has always been well understood. When Congress was considering S. 2517, which became the 1958 Amendment to 43 U.S.C. 852, the Department of Interior reported to Congress that:

> In giving a State sections in place *it was intended that a State would acquire a proportionate part of all classes of land within its boundaries*, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965) (Emphasis added).

But this policy was not realized in Utah. When Utah was compelled to select lands as indemnity for sections in place having a value much higher than the selected lands, the Secretary never objected on the ground that Utah was being short-changed. Even now,

under the Secretary's new policy on comparative value, there is a totally one-sided view. The Secretary desires to reject mineral land indemnity selections when the selected land is more valuable than the base mineral lands—but the Secretary is perfectly willing to approve selections where the base lands are more valuable than the selected lands—and, in that event, the Secretary seems to claim that he cannot make any adjustment to compensate the State for the federal windfall—because, the Secretary argues, once he has "unlocked" the public domain by approving lands as suitable for school indemnity selection, he then is bound by the "equal acreage" provisions of 43 U.S.C. 852.

Much of what has been said above is wide of the mark with respect to the issues properly before the Court. However, it is not inappropriate in light of the Secretary's bald and repeated efforts to induce the Court to grant certiorari by making irrelevant but false claims about unfair windfalls to the State of Utah.

In short, the Secretary has not stated a legitimate jurisdictional basis for a writ of certiorari.

II. *RESPONSE TO ARGUMENTS ADVANCED BY SECRETARY*

A. *Preface*

It is abundantly clear that the Secretary of the Interior desires to reject Utah's school indemnity selections by implementing a "comparative value" test" and endeavors to justify such action under "classification" authority allegedly derived from Section 7 of the Tay-

lor Grazing Act, and necessitated by an alleged withdrawal of lands under Executive Order No. 6910. This controversy came into focus when Tracts U-a and U-b in Utah were leased for oil shale development in 1974 as part of a federal prototype oil shale leasing program, resulting in a combined "lease bonus" bid of approximately $120 million, with 20% of the bonus to be paid in cash each year for the first three years and the last two "payments" to be credited against development costs incurred by the lessees.

Prior to publishing notice for competitive bidding on the prototype tracts, the Secretary of Interior—aware that the proposed prototype tracts had previously been selected by Utah as school indemnity lands, and also aware that Utah claimed equitable title to such lands—requested the Governor of Utah to enter into an agreement with the United States whereby Utah would consent to the issuance of leases by the Secretary, and, if Utah prevailed in its claim to equitable title, Utah would accept the leases as lessor and would honor the terms of the leases. Such an agreement was executed. (Secretary's petition, pp. 52a-53a).

The Secretary claims that the "comparable value" test derived from a policy established by his predecessor Secretary Stewart L. Udall on January 18, 1967, and that the policy has "won congressional approval." (Secretary's petition, p. 23). Nothing could be farther from the truth, as will be seen below.

B. *The "Udall Memorandum" on Comparative Value*

The origin of the comparative value test is somewhat curious. On December 15, 1966, the Director of the Bureau of Land Management sent an intradepartmental memorandum to the Secretary of Interior through the Assistant Secretary for Public Land Management. This memorandum raised questions as to the comparative values of base lands and selected lands, and proposed certain value criteria to be met before indemnity selections received approval, and concluded by stating:

> Your approval of this memorandum will constitute your approval of the suggested guidelines.

At the end of the memorandum a space was provided for the signature of the Secretary, and it apparently was signed on January 18, 1967, by Stewart L. Udall, then the Secretary of the Interior (R., Vol. III, pp. 49-51). While the guidelines contained within the memorandum have never been implemented in connection with any school indemnity selections, even though the memorandum is more than twelve years old, it has become the sole source of the Secretary's "policy" for employing such a comparative value test.

It seems that the Udall memorandum was buried somewhere in Department of Interior files for more than seven years. It was the best kept secret in Washington. No one outside of Interior was advised of its existence. Apparently it was never published in the Federal Register, was not the subject of any rule-making procedures, and was not implemented by any regulations published in the Code of Federal Regulations. It apparently has

never to this day been utilized in any so-called "classification" of school indemnity selections. It is particularly interesting that, as recently as 1976, the Interior Department's own Board of Land Appeals was not aware of, and could not find, the Udall Memorandum. See *State of New Mexico*, IBLA 75-582, 24 IBLA 135, 137 (March 8, 1976).

And, equally interesting, is the fact that more than five years after the Udall memorandum allegedly became official Department "policy," Secretary of Interior Rogers Morton was not aware of its existence. On May 23, 1972, Secretary Morton wrote to Utah's Governor Calvin L. Rampton concerning the very school indemnity selections now in dispute, and assured Utah that to the extent the matter was within his discretion he would approve Utah's selections, and would disapprove them only if there was some legal "barrier" which prohibited approval:

> The opinion of the Attorney General has been requested concerning the filings for selection of mineral lands by the State of Utah. The Attorney General has been asked whether there is any legal barrier to the approval of the filed selections of the State of Utah and what point in time the rights of the State vest, i.e., at the time of filing for selection or at the time of approval of such selections.
>
> . . .
>
> . . . *If the Attorney General finds that there is no legal barrier to the approval of the State selection, then this Department will initiate the administrative steps necessary to accomplish that approval.*

> *With this information and assurances at your disposal,* will you withdraw any objection to the proposed leasing of two tracts of land in Utah for oil shale development? (Emphasis added; R., Vol. III, p. 68).

If Secretary Morton had been aware of any "comparative value" policy that would have given him discretion to reject the selections, he surely would have mentioned it when he gave Utah his "assurances" that he would initiate the necessary administrative steps to accomplish approval of the indemnity selections.[3a]

In any event, Utah was never advised as to when, if ever, the Secretary received the requested opinion from the United States Attorney General. If such an opinion was prepared, it has never been made public.

It was not until February 14, 1974—more than seven years after the Udall memorandum was signed—that the "comparative value" policy first saw the light of day. On that date, Secretary Morton wrote a further letter to Governor Rampton concerning Utah's school indemnity selections. Utah was startled to learn of the "comparative value" policy, as explained by Secretary Morton:

> As you know, the Department of the Interior has not as yet acted upon the State's applica-

[3a] If the Secretary really believed that he was authorized or required to "classify" school indemnity selections under Section 7 of the Taylor Grazing Act, he certainly would have mentioned that fact to Governor Rampton in his May 23, 1972 letter; and he certainly would not have asked the United States Attorney General if "the rights of the State vests" at the date of selection.

> tions. The principal question presented by the applications is whether pursuant to Section 7 of the Taylor Grazing Act, 48 Stat. 1272 (1934), as amended, 43 U.S.C. §315f (1974), the Department may refuse to convey applied-for lands to a State where the value of those lands greatly exceeds the value of the lost school lands for which the State seeks indemnity. In January 1967, the then Secretary of the Interior adopted the policy that in the exercise of his discretion under, *inter alia,* Section 7 of the Taylor Grazing Act, he would refuse to approve indemnity applications that involve grossly disparate values. That policy remains in effect.
>
> In the present case, although the land values are not precisely determined, it appears that the selections involve lands of grossly disparate values, within the meaning of the Department's policy. While the Department is not yet prepared to adjudicate the State's applications, I feel it is appropriate to advise you that we will apply the above-mentioned policy in that adjudication. (R., Vol. III, p. 70).

It is perhaps revealing that the Secretary now characterizes the February 14, 1974 letter as an "announcement" of the Udall memorandum. (Secretary's petition, p. 5). Utah initiated this litigation less than three weeks after receipt of Secretary Morton's February 14th letter.

It seems significant that the Secretary has never explained how comparative values would be determined. Any appraisal of values under the Taylor Grazing Act would be conducted by the Bureau of Land Management, and could consider surface estate values only,

since mineral deposits are within the jurisdiction of the United States Geological Survey under 43 U.S.C. 31(a). Moreover, mineral deposits cannot be evaluated by a "walk-on" inspection, but would require extensive drilling and blocking, at a cost of untold millions of dollars. There is no evidence that the Secretary has ever requested Congress to fund such a program. Indeed, the lower court was most skeptical as to whether the Secretary even had an established "policy" that could be implemented in any effective way:

> At no time or in anywise has the Secretary seen fit to inform the State of Utah, the district court or this court just how this determination is to be undertaken. Thus, at this time, it seems that we can safely relate—based upon the arguments presented and the record before us—that the criteria, processes and methods for determination of the "equal value" urged by the Secretary are nonexistent, or otherwise so vague as to presently fall within the realm of guesswork or speculation. (Secretary's petition, pp. 18a-19a).

Aside from the very dubious nature and status of the Udall memorandum as an administrative tool, it is important to emphasize that the "policy" embraced in that memorandum is clearly contrary to law and has been expressly rejected by Congress.

First, 43 U.S.C. 851 expressly grants and appropriates "other lands of equal acreage" as indemnification for lost school lands. The Udall memorandum would reverse this congressional grant, and by an illegal administrative fiat amend the statute to read "other lands

of equal value" are appropriated to satisfy school indemnity rights.

Furthermore, Congress has provided its own measure of fair value in indemnity selections by authorizing States to select mineral lands *only* when lost school lands are also mineral in character. If Congress had intended to authorize the Secretary to employ an additional value criterion, it would have expressly done so, as it did in Section 8(c) of the Taylor Grazing Act (43 U.S.C. 315g(c)), wherein the Secretary is authorized to utilize either equal acreage or equal value as the basis for approving *exchanges* of state land for federal land.

As indicated earlier, the Secretary has never applied a comparative value criterion in acting on any prior school indemnity selections. The Secretary claims as his source of authority for the Udall memorandum the 1936 Amendment to the Taylor Grazing Act, and so he claims to believe that he has had this authority for more than forty years—and yet he has never used it. Prior school indemnity selections, as filed by Utah and other States, have never been subjected to such a comparative value test. But now, for the first time, the Secretary desires to initiate this practice to deny Utah's school indemnity selections.

And it is of substantial significance that the Secretary has repeatedly asked Congress for authority to employ a comparative value test when determining whether school indemnity selections are in accordance

with congressional requirements. Congress has steadfastly refused to grant the Secretary such authority. Early in 1963, Congressman Wayne Aspinall (D.Colo.) introduced H.R. 16, which would have provided that school indemnity selection of mineral-rich land would be authorized only when the lost lands were of equal value. If the bill had passed there would have been a question as to whether it was unconstitutional as a unilateral amendment of a bilateral compact between sovereigns, but the bill was tabled. And that was that!

Then, in 1966, when H.R. 5984 was introduced to amend 43 U.S.C. 852 by allowing States to select unsurveyed lands as indemnification for lost school lands, the Department of Interior sought to have the bill amended to require equal value rather than equal acreage for school indemnity selections. In rejecting any such amendment, the Senate Committee on Interior & Insular Affairs noted:

> The Department of the Interior, in its report which is included below, indicated it favored amendment of the bill to include an equal value concept with respect to lands valuable for leasable minerals involved in State selections, in place of the acre-for-acre basis. The Department stated a preference for legislation with this concept, but indicated no objection to the enactment of the bill without it. The Senate committee, believing this issue extraneous to the specific purpose of H.R. 5984, rejected such an amendment. However, the chairman of the full committee has suggested that the administration reexamine its position on the equal value concept, and make specific recommendations on that public land issue. (Senate Report No. 1213, 89th Cong., Second Sess., 1966, at p.2).

So, without the Department's requested "equal value" amendment, H.R. 5984 was duly enacted into law as the Act of June 26, 1966, PL 89-470, 80 Stat. 220, amending 43 U.S.C. 852.

The Department of Interior's change of position in registering "no objection" to enactment of PL 89-470 without the Department's previously requested amendment to provide "an equal value concept" drew the attention of the lower court:

> Whereas land grants generally are to be construed favorably to the Government and nothing is held to pass except that conveyed in clear language, (United States v. Union Pacific Railroad Company, 353 U.S. 112 (1957)), legislation enacted by the Congress designed to aid the common schools of the states is to be construed liberally rather than restrictively. State of Wyoming v. United States, 255 U.S. 489 (1921). We deem this to be particularly significant in recognition that the sole specific Congressional reference in §852(a)(1), *supra*, relates to lands ". . . mineral in character may be selected by a State [if] . . . the selection is being made for mineral lands lost to the State because of appropriation before title could pass to the State; . . . ." No reference whatsoever is made to the *value* of the "minerals in character." ***This becomes the more significant, we believe, when we consider that the legislative history to P.L. 89-470, 89th Congress, 2nd Session, reflects, as do other reports, that the Department of the Interior withdrew its proposed amendment which would have***

> ***included an equal value concept with respect to lands valuable for leaseable minerals in the place of the existing "acre for acre" selected basis.*** U.S. Code, Cong. & Ad. News, 2nd Session, Volume II, p. 2324 (1966). (Secretary's petition, p. 20a; Emphasis added).[4]

Congress was directly confronted with the "equal acreage" rather than "comparative value" basis for school indemnity selections on other occasions. In 1958 the House Committee on Interior and Insular Affairs carefully considered the matter in connection with S. 2517, which became an amendment to 43 U.S.C. 852. The Committee concluded that the federal interest was adequately protected by the equal acreage criterion:

> *The Federal interest is amply protected by S. 2517. Mineral lands may be selected as indemnity lands only for other mineral lands.* Lands on a known geologic structure of an oil and gas field may be selected as indemnity only for lands similarly situated. And lands subject to mineral lease or permit may be selected only if all lands subject to the lease or permit are chosen and only if none of the lands is in a producing or producible status. The character of the lands for which indemnity is sought will be determined as of the date of application for selection. (1958 U.S. Code Cong. and Adm. News, p. 3964). (Emphasis added).

And, at that time, the Department of Interior submitted a report to Congress that clearly recognized the

[4] It was in December 1966—the very year that Congress rejected (and the Department withdrew its request for) an equal value criterion—that officials in the Department of Interior apparently drafted the "Udall memorandum."

right of the States to select school indemnity lands of equal acreage, as distinguished from various exchanges under other laws where equal value was the measure of the exchange:

> Under other statutes a State . . . may exchange . . . lands of equal value, but, naturally, a State would prefer to use lands of little value as base for indemnity selections rather than for exchanges. The reason for this is that in making indemnity selections lands are taken on a equal acreage basis, but under the Taylor Grazing Act, as amended, (43 U.S.C., sec. 315 et seq.), and the Forest Exchange Act, as amended, (16 U.S.C., secs. 485-486), exchanges are on a basis of equal value.[4a]

> The direction in which self-interest would lead a State in such a situation is obvious. Any objection to permitting a State to select lands on a basis of equal acreage would be greatly increased if it were to be permitted to select mineral lands in lieu of non-mineral lands which had been lost. In giving a State sections in place it was intended that a State would acquire a proportionate part of all classes of land within its boundaries, and the authorization to make selections on the basis of equal acreage rather than equal value carries this policy forward. (1958 U.S. Code Cong. and Adm. News, p. 3965).

Of course, the 1958 Amendment to 43 U.S.C. 852 did not, and had never purported to, authorize the

[4a] The Department thus makes it absolutely clear in this 1958 report not only that school indemnity selections must be on the basis of equal acreage rather than equal value, but, perhaps more important, that such selections have nothing at all to do with the Taylor Grazing Act.

States to select mineral lands as indemnity for lost non-mineral lands. The requirements for mineral selection were as explained by the House Committee on Interior and Insular Affairs, quoted above.

In view of the clear and repeated insistence by Congress that school indemnity selections be on the basis of equal acreage, it is difficult to see how the Solicitor General can now represent to this Court that the policy of the Udall memorandum, though never implemented, is a "practice" that has "won congressional approval." (Secretary's petition, p. 23). The whole basis for such a representation is an alleged letter—not in the record—written in January of 1974 by two Senators to the Secretary of the Interior, apparently referring to the Udall memorandum, and declaring that "we agree with the policy adopted by the Department in 1965 that State selections should not be allowed where there is a 'gross disparity' of value between the lost lands and the selected lands." This letter apparently was written one month before that "policy" was "announced" to Utah in Secretary Morton's letter to Governor Rampton on February 14, 1974. Apparently the two Senators were not too familiar with the Udall policy, since they thought it was promulgated in 1965, rather than in 1967. (Secretary's petition, pp. 23-24).

More to the point, however, is the fact that the Secretary relies on the 1936 Amendment to the Taylor Grazing Act as his sole source of authority for promulgation of the Udall memorandum, and the further fact that the Secretary relies solely on a letter written by

two Senators thirty-eight years after that statute was enacted, to show that the Udall memorandum is a "practice" that has "won congressional approval." That argument is nothing short of absurd.

And the Secretary is not being candid with the Court with respect to the *actual* practices that his Department has followed. The Secretary's present position in support of an equal value criterion is entirely inconsistent with everything that has gone on previously, both before and after the 1936 Amendment to the Taylor Grazing Act. The cases and departmental decisions were entirely clear and consistent in recognizing equal acreage, rather than equal value, as the measure for indemnity selections. See *Mullan v. United States*, 118 U.S. 271 (1886); *California v. Deseret Water Company*, 243 U.S. 415 (1915); *United States v. Morrison*, 240 U.S. 192 (1916); *Payne v. New Mexico*, 255 U.S. 367 (1921); *Wyoming v. United States*, 255 U.S. 489 (1921); and 52 I.D. 273 (February 1, 1928). The same result has obtained since the 1936 Amendment: see *State of California*, 67 I.D. 85 (February 29, 1960); and 43 C.F.R. 2621.0-3.

Of particular significance is the fact that on September 14, 1962, Thomas J. Cavanaugh, Associate Solicitor for Public Lands, advised the Director of the Bureau of Land Management with respect to the legality of considering disparity of values in school indemnity selections. Associate Solicitor Cavanaugh, it will be noted, commented on both the 1958 Amendment to 43

U.S.C. 852 and the Department's report thereon. And his opinion was firm and conclusive:

> In considering an application by a state for indemnity selection under 43 U.S.C. 851, 852, the disparity in values between the lands offered as base and the lands selected cannot be considered. . . .
>
> When the state lieu selection statutes were last amended in 1958, it was clear that Congress recognized the practice by the states of offering as base for indemnity selection lands of little value for lands of greater value because of the equal acreage (rather than equal value) provisions of that law. . . . Accordingly, it is clear that the 1958 amendments to the state indemnity selection laws not only reaffirmed the position of this Department that discrepancies in values between offered and selected lands was not to be considered, but also intended the equal acreage rather than equal value test be carried forward in the case of mineral lands. Therefore, the mere fact that the mineral value of the selected lands far exceeds that of the offered lands may not operate as a bar to the selection. (R., Vol. III, pp. 42-43).

What more need be said? Nothing perhaps, except that the foregoing records within the Department are entirely inconsistent with the Department's present argument that all federal land within twelve Western States was locked up and unavailable for school indemnity selection by virtue of Executive Order No. 6910, issued in 1934 (see Section II.D of this brief, *infra*).

C. *Congressional Consideration of Classification under Section 7*

In his petition, the Secretary makes repeated claims that the decision by the court below overturns an administrative practice that the Department of Interior has followed for nearly half a century, with the approval of Congress (see, *e.g.*, Secretary's petition, p. 20). The "practice" is "classification" of land under Section 7 of the Taylor Grazing Act to free it from the withdrawal of Executive Order No. 6910, issued in 1934. This argument is not persuasive, for a number of reasons.

First, as the preceding section of this brief has demonstrated and documented, the Secretary now desires merely to implement for the very first time a "comparative value" policy as set forth in the Udall memorandum, and to invoke an alleged "classification" authority under Section 7 of the Taylor Grazing Act as the mechanism for doing so. And it has been shown that such a policy is directly contrary to existing statutes, and that Congress has repeatedly and steadfastly refused to grant to the Secretary authority to implement such a policy.[5]

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[5] The Secretary repeatedly endeavors to diminish the nature and status of the school trust lands program. For example, on page 10 of the Secretary's petition it is said that "patents" must issue for such lands, from the United States to the State.

Surely, the Secretary knows that patents do not issue from the United States to convey title to lands selected as school grant indemnification. As this Court held in **Wyoming v. United States, supra**, equitable title to the land selected vests in the State at the date of selection by virtue of the respective enabling act and also by 43 U.S.C. 851-852. The Secretary's administrative adjudication of the selections under 43 U.S.C. 852

Second, Section III of this brief, *infra*, demonstrates in considerable detail why the Taylor Grazing Act has no reasonable ambiguities with respect to school indemnity selections—it simply does not apply to such selections. The lower court was plainly correct in so holding. While Utah acknowledges that courts ordinarily accord some deference to an administrative interpretation of a statute by an agency charged with administration of the statute, that rule applies only where there is a "reasonable" basis in law for the agency's interpretation. The courts will not defer to an administrative interpretation that is not reasonable:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law" . . . But the courts are the final authorities on issues of statutory construction, . . . and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." . . . (*Volkswagenwerk v. FMC*, 391 U.S. 261, 272 (1968); citations in quote omitted).

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5 Continued

merely determines whether the selection under adjudication is in accordance with the statutory criteria of Section 852, and, if so, he so certifies by a "clear list" and this has the effect of perfecting fee title in the State. (See 43 U.S.C. 859). Clear lists never contain any language purporting to convey or grant title, as would a patent or other instrument of conveyance. The Secretary never has, and does not now, issue "patents"—he merely certifies by a clear list. The reference to "patents" in the Secretary's petition is a serious misconception of the basic nature of the school indemnity program.

See also *N.L.R.B. v. Brown*, 380 U.S. 290 (1965); *Moor v. County of Alemeda*, 411 U.S. 743 (1973); *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965); *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); and *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Circ. 1971).

It is significant that the Secretary, in his petition before this Court, offers not one word of legislative history to support the Interior Department's unreasonable interpretation of the 1936 Amendment, but merely requests this Court to defer to such interpretation. That is not good enough! The Secretary must, as a minimum, show that the Department of Interior's interpretation has a "reasonable basis in law," and this he has utterly failed to do. And the lower court properly so held.

Third, there is no persuasive indication that Congress ever really considered the Secretary's administrative interpretation of Section 7 of the Taylor Grazing Act. At pages 19-20 of his petition, the Secretary cites two congressional committee reports which incorporate parts of letters sent by the Secretary to the congressional committees, reciting that amendments to 43 U.S.C. 852 would not change Section 7 of the Taylor Grazing Act or the Secretary's practice thereunder.

But this appears to have been a perfunctory act by the congressional committees, since there appears not to have been one word of discussion or debate—either on the floor of Congress or in committee hearings—to indicate that school indemnity selections should be sub-

ject to secretarial classification under Section 7. Contrasted with the intense congressional attention and scrutiny given to school land grants and indemnification procedures, the Secretary has advanced a very weak argument. It is entirely unreasonable to assume that Congress intended—even if it could lawfully do so—to emasculate the school trust grants without a single word of discussion or debate concerning such an emasculation.

Further, as shown above, even a congressional acquiescence in an agency interpretation of a statute will not be adopted by the courts if there is no reasonable basis in law for such an interpretation. Where, as here, the agency interpretation is unreasonable, it is invalid, as the lower court correctly concluded.

A case which presented a much more persuasive factual basis for judicial deference to congressional acquiescence in an administrative interpretation of a statute was recently decided by the United States Court of Appeals for the Ninth Circuit. In *United States v. Imperial Irrigation District*, 559 F.2d 509 (1977), it was held that the Secretary of the Interior's administrative interpretation of the excess lands provision (160-acre limitation) of the Omnibus Adjustment Act of 1926 was not binding or controlling on the courts. The lower court (322 F.Supp. 11) had held that an administrative decision of Secretary of the Interior Ray Lyman Wilbur, issued February 24, 1933, was binding on the court because (1) it had been followed consistently for nearly forty years, (2) the legislative history of the

Omnibus Adjustment Act of 1926 supported the Secretary's opinion, (3) Congress repeatedly had been made aware of the Secretary's opinion and seemingly acquiesced in it, and (4) very substantial investments had been made by private parties in reliance on the Secretary's opinion.

Those facts and contentions were set forth in considerable detail at 322 F.Supp. 15-27. A careful review of those facts will demonstrate that there was genuine, active and repeated congressional acquiescence in the administrative interpretation. Nevertheless, the Ninth Circuit Court held that the Secretary's opinion in 1933 was an incorrect interpretation of the law and would not be followed by the court:

> . . . The appropriate deference to be accorded an administrative construction of a statute is that a 'consistent and longstanding' interpretation of a Congressional enactment by an agency charged with administration of that statute is entitled to 'considerable weight' but it does not control the decisions of the courts. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975). The ultimate responsibility of interpreting the language of Congress resides in the courts. *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 24 L.Ed.2d 345 (1969). (559 F.2d 509 at 539).

In the *Imperial* water controversy, a later Secretary of the Interior had determined that a forty-year-old administrative opinion of a predecessor Secretary was in error and should be reversed, but the trial court said that the later Secretary of the Interior could not

change the administrative interpretation adopted by the earlier Secretary. The Court of Appeals for the Ninth Circuit reversed on appeal. That decision is clearly sound, as is the decision of the Tenth Circuit in this case.[6] See annotation 39 L.Ed.2d 952 *et seq.*

D. *The Pickett Act and Executive Order No. 6910*

The Secretary argues in his petition that the lands selected by Utah in this case were not available for selection unless "unlocked" by classification under Section 7 of the Taylor Grazing Act because all unappropriated public domain in Utah had been withdrawn in 1934—and still remains withdrawn—for classification and examination by Executive Order No. 6910, issued under the Pickett Act.

The Pickett Act of June 25, 1910, was codified as 43 U.S.C. 141 prior to its repeal in 1976, and provided as follows:

> The President may, at any time in his discretion, *temporarily withdraw from settlement, location, sale, or entry* any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (Emphasis added).

[6] It also is illustrative to mention **United States v. California, 332 U.S. 19 (1947)**, where this Court held that there would be no judicial deference to administrative interpretations so as to prevent the United States from claiming ownership of the marginal seabed off the California coast, including all minerals and natural resources therein, notwithstanding the fact that federal officials for many years had taken the administrative position that ownership was vested in the State of California. That administrative view was erroneous and was rejected by this Court.

The Secretary argues that Executive Order No. 6910, made under authority of the Pickett Act, withdrew the land described therein so as to prevent school indemnity selections unless and until the land was classified as suitable for disposition under Section 7 of the Taylor Grazing Act. That order was issued by President Roosevelt on November 26, 1934, expressly identified the Pickett Act as authority for the order, and provided, in part, that:

> . . . it is ordered that all of the vacant, unreserved and unappropriated public land in the States of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah and Wyoming be, and it hereby is, temporarily withdrawn from settlement, location, sale or entry, and reserved for classification, and pending determination of the most useful purpose to which such land may be put in consideration of the provisions of said act of June 28, 1934, ...

Thus, this executive order withdrew 100% of the "vacant, unreserved and unappropriated" public land in twelve Western States, for classification "of the most useful purpose to which said land may be put in consideration of the provisions" of the Taylor Grazing Act of 1934.

The Secretary now raises two legal questions by asserting that Executive Order No. 6910 prevents school indemnity mineral selections. The first is whether the Pickett Act authorized any withdrawals that would defeat school indemnity selections; and the second is whether Executive Order No. 6910 intended to withdraw lands from school indemnity mineral selection.

With respect to the first question, it will be noted that both the Pickett Act and Executive Order No. 6910 apply only to withdrawals from "settlement, location, sale or entry." There is no authority to withdraw from school indemnity selection. Selections are not settlements. They are not sales. They are not entries. They are simply school indemnity selections that appear to be beyond the reach of the Pickett Act and Executive Order No. 6910 promulgated thereunder. But the lower court found it unnecessary to decide whether land withdrawals by virtue of an executive order promulgated under the Pickett Act conceivably could defeat school indemnity selections, because it was entirely clear to the court that Executive Order No. 6910 sought to accomplish no such purpose.

In his petition, the Secretary ponders the question as to what kinds of withdrawals might prevent school indemnity selection:

> What is not entirely clear . . ., however, is whether all "withdrawals" remove lands from the selection pool. Is it only a withdrawal for a specific purpose, such as creation of a national park, that renders the lands unavailable for selection? (Secretary's petition, p. 14).

On page 15 of his petition, the Secretary then purports to answer his own question by suggesting that any type of withdrawal will prevent school indemnity selections:

> If any doubt remained, it was put to rest by *United States v. Wyoming*, 331 U.S. 440 (1947), where a Pickett Act withdrawal of lands, *without the creation of any special-purpose reservation*, was held to defeat an original school grant. (Emphasis added).

But Utah does not read *United States v. Wyoming* as has the Secretary. There, the withdrawal was by virtue of a Presidential order issued December 6, 1915, which specifically reserved the lands as part of Petroleum Reserve No. 41. (331 U.S. at 442, 444).[7] This, then, was in fact a "special-purpose" reservation, and was a far cry from the general withdrawal for purposes of classification under Executive Order No. 6910.[8]

The Secretary's argument is so vulnerable that it is difficult to choose among potential starting points. Perhaps the most shocking and absurd result of such an argument is that *every acre* in the twelve States identified in Executive Order No. 6910 would have been

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[7] While the Presidential Order was issued December 6, 1915, the survey was not made and approved until July 27, 1916, more than seven months later. Thus the school section in place could not have passed to Wyoming until July 27, 1916, and prior to that time the section was withdrawn and placed within Petroleum Reserve No. 41, and thus could not pass to the State (331 U.S. 442 et seq.)

[8] In the trial court and also in the court below the Secretary relied on Executive Order No. 5327, which was issued by President Hoover on April 15, 1930, and which was a general withdrawal of certain lands for classification. But, before this Court, the Secretary seems to have abandoned that argument.

locked up since 1934 so that the States could receive *neither their school land grants in place nor indemnity selections* for lost base lands, unless the Secretary decided—unaided by any statutory criteria or guidance—that the school lands so granted were "suitable" for disposition.

Under the Secretary's argument, the seeming inocuous language in Executive Order No. 6910, expressly intended only to implement the purposes of the Taylor Grazing Act, would have the effect of repealing the school land grants as set forth in the enabling acts of the various "public land" States, and substituting therefor an entirely different system whereby the Secretary would have the exclusive discretion to determine whether the States would receive their school land grants in place for all lands surveyed after 1934, and whether school indemnity selections after 1934[9] should

[9] The Secretary's position with respect to the date the public domain allegedly became "locked up" and immune from school indemnity selection is not entirely clear.

In the lower court it seemed that the Secretary relied on the date of April 15, 1930, which was the date of President Hoover's Executive Order No. 5327. Before this Court, the Secretary sometimes seems to argue for the date of June 28, 1934, which was the date that the Taylor Grazing Act became law; and at other times he seems to rely on June 26, 1936, which was the date that Section 7 of the 1934 act was amended.

But most of the time the Secretary's argument seems to be that the lands became "locked up" by Executive Order No. 6910, issued November 26, 1934, under authority of the Pickett Act and for the purpose of implementing the Taylor Grazing Act; and the Secretary then argues that the 1936 Amendment to Section 7 of the Taylor Grazing Act was necessary to provide for "classification" as a key to unlock the lands withdrawn by Executive Order No. 6910.

Therefore, throughout this brief it is assumed that the date of November 26, 1934, is the date at which the Secretary claims that all of the public domain located in the twelve States named in Executive Order No. 6910 became "locked up" and unavailable for school indemnity selection.

be approved in light of the Secretary's unguided determination of the public interest.

The absurdity of the Secretary's position is highlighted by the waffling he now must do to try to make the ends of his arguments meet. On the one hand, the Secretary seeks to ascribe to Congress a reasonable and rational intent to provide for management and disposition of the public domain; but, on the other hand, the Secretary finds it necessary—to support his irrational position—to claim that Congress blundered in 1934 when it enacted the Taylor Grazing Act, that President Roosevelt blundered in 1934 when he issued Executive Order No. 6910 and that—as a result of these blunders—Congress had to come to the rescue in 1936 by amending the Taylor Grazing Act in such a way as to give to the Secretary unbridled discretion in reviewing and approving or rejecting school land grants to the States.[10]

This shocking fiction is referred to at page 16 of the Secretary's petition where, speaking with respect to Executive Order No. 6910, it is said that:

> Indeed, the withdrawal was deemed so effective that, absent remedial legislation, the Secretary found no authority to release any part of the affected lands for State indemnity selection. See 59 Interior Dec. at 321.

The Interior Decision referred to offers this lame rationale:

[10] Section III.E. of this brief, **infra**, discusses in some detail many of the reasons why the Secretary's argument is diametrically opposed to the very nature and purpose of the Taylor Grazing Act and the 1936 Amendment thereto.

> Section 7 of the Taylor Act [before the 1936 Amendment] authorized the Secretary to classify such lands in grazing districts as might be more valuable for the production of agricultural crops than for native grasses and forage plants and to open them to homestead entry, but it made no provision for the classification and restoration of the withdrawn lands for any other purpose . . . . The whole public domain had been appropriated and reserved by the withdrawals and could be opened only for homestead entry . . . . This unprecedented situation could not be allowed to continue. By act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315f), the Congress amended section 7 of the Taylor Grazing Act to permit the classification of withdrawn lands suitable for uses other than homestead entry and their restoration to the public domain for disposal in accordance with such classification under the appropriate public-land laws . . . .
>
> It is further to be noted that under section 7, as amended, no substantive rights whatever can be acquired by any applicant unless the Secretary shall give to the lands sought the classification requested. The section expressly provides that the withdrawn lands "shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry." This provision testifies conclusively to the congressional intent of 1936 that a suitable classification of land should thenceforth be the indispensable condition precedent to any disposal of any portion of the public domain in the continental United States. (59 I.D. 321-22 (1946)).

This Interior Department's administrative opinion is nothing short of preposterous. It cites not one word of legislative history to justify the outrageous conclusion

that the 1936 Amendment was intended by Congress to cure the blunder it allegedly had made by enactment of the 1934 Taylor Grazing Act and the blunder President Roosevelt allegedly made later in 1934 by issuing Executive Order No. 6910, resulting, it is said, in locking up the "whole public domain" so that no public lands could be disposed of for any purpose other than homestead entries. Rather than cite the clear legislative history which shows that the 1936 Amendment had no such purpose and accomplished no such result,[11] the Interior Department opinion prefers to seek strength from stout prose, declaring that the 1936 Amendment "testifies conclusively to the congressional intent" to require classification as a condition precedent to school indemnity selection.

The lower court would have none of this. Unable to swallow the Secretary's drama concerning the alleged reach and effect of Executive Order No. 6910, the lower court rejected it summarily:

> Finally, we reach the Secretary's contention that classification is likely required under Executive Order 5327[12] issued by President Hoover on April 15, 1930, and Executive Order 6910 issued by President Roosevelt on November 26, 1934. Both constituted withdrawals of all of the vacant, unreserved and unappropriated lands of the public domain subject to certain classification and examination. We have carefully reviewed these orders. We hold that nothing in these orders

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[11] **See Section III.E.1 of this brief, infra.**

[12] **See note 8, supra, where it is explained that in the court below the Secretary had relied on Executive Order 5237 in support of his position.**

can be construed to apply to state school indemnity selections. (Secretary's petition, Appendix B, p. 51a).

III. *THE DECISION BY THE COURT BELOW IS CLEARLY CORRECT*

A. *Preface*

It is difficult to respond to the petition of the Secretary without arguing the merits of the decision which the Secretary seeks to have this Court review. This is so because, as has been pointed out above, the entire thrust of the Secretary's argument is that the opinion below is simply wrong. A direct respense to that argument is that the opinion below is clearly correct. Therefore, while Utah understands that a brief in opposition to a petition for certiorari should not be a full-fledged argument of the merits of the decision below—as if certiorari had already been granted—it seems both appropriate and necessary to present some argument in support of the lower court's decision. For one thing, the Secretary has argued in his petition virtually all of the points on the merits that he argued below. For another, if it appears clear to this Court that the lower court was correct, then there would be little point or purpose in granting a writ of certiorari.

The best defense of the lower court's opinion is the opinion itself. It is thorough and well reasoned. It effectively answers the arguments again raised by the Secretary in his present petition. It was decided by a unanimous court. When the Secretary filed a petition for rehearing in the court below with a suggestion that

the rehearing be *en banc*, not a single judge on the Tenth Circuit favored rehearing. Thus, despite the arguments that follow, Utah believes that a careful scrutiny of the lower court's opinion would be the most profitable utilization of this Court's time.

Since the Secretary attached the lower court's opinion to his petition as Appendix B, Utah perceives no point in appending it to this brief. When reference is made in this brief to particular parts of that opinion, the citation will be to the appropriate part of Appendix B of the Secretary's petition.

B. *Public Trust Nature of School Land Grants*

1. *Introduction*

The Secretary views indemnity selections for school land grants in place as a congressional authorization for him to decide—based on his personal notions of public policy — when, whether and to what extent such selections should be approved. This is a mistaken view. Unlike most federal land grants, school land grants are made in trust to create a permanent fund for the support of the public school system of the State. This trust is extremely important and involves fundamental concepts of equal footing, sovereign governmental functions, and bilateral compact between sovereigns. Since the Secretary seeks to emasculate this public trust through his personal notions of public policy, it seems important to quote part of the lower court's summary of the nature of this trust:

The historical background leading to Congressional enactment of the state school land grant statutes should aid in lending perspective to the legislative intent.

There were no federal lands within the borders of the original thirteen states when they adopted and ratified the United States Constitution. Thus, virtually all of the lands within their borders were subject to taxation, including taxation necessary for the maintenance of their public school systems. When other states were subsequently admitted into the Union, their territorial confines were "carved" from federal territories. The "public lands" owned and reserved by the United States within those territorial confines were not subject to taxation. This reservation by the United States created a serious impediment to the "public land" states in relation to an adequate property tax base necessary to permit these states to operate and maintain essential governmental services, including the public school systems. ***It was in recognition thereof, i.e., in order to "equalize" the status of the newly admitted states with that of the original thirteen states, that the Congress enacted the federal land grant statutes. The specific purpose was to create a binding permanent trust which would generate financial aid to support the public school systems of the "public land" states.*** The nature of the Congressional land grant program was "bilateral" in effect. It constituted a solemn immunity from taxation of federal lands reserved or retained in ownership by the United States within the territorial boundaries of the newly admitted states in return for the acceptance by the states of the lands granted, to be held and administered by the states under trust covenants for the perpetual benefit of the public school systems.

> Large quantities of the public domain have been granted by the Congress to the various states either for general or specific purposes. Many of these grants are unrestricted. None, to our knowledge, involve the trust covenants attendant with the state school land grant statutes. A grant by Congress of land to a state for the benefit of the common schools is an absolute grant, vesting title for a specific purpose. Alabama v. Schmidt, 232 U.S. 168 (1914). The school land grant and its acceptance by the state constitutes a solemn compact between the United States and the state for the benefit of the state's public school system. State of Nebraska v. Platte Valley Power and Irr. Dist., 23 N.W.2d 300 (Neb. 1946), 166 A.L.R. 1196. A state accepting the school land grant must abide its duty as trustee for the benefit of the state's public school system. This duty applies with equal force to those specific school lands granted or those lands selected by the state as indemnity or lieu lands. The indemnity or lieu "selections" by a state arise if any of the lands within the specific congressional grant (usually of sections 16 and 36 in each township) are not available by reason of preexisting rights of others. McCreery v. Haskell, 119 U.S. 327 (1886). (Petition, Appendix B, pp. 12a-14a; Emphasis in Opinion).

The summary quoted above is well founded in the law. A few aspects deserve special emphasis, as noted below.

2. *Equal Footing*

States admitted into the Union are accorded equal footing with the Original States, and the respective enabling acts so provide. The status of equal foot-

ing is not merely a matter of congressional grace, but is a fundamental constitutional requirement.' *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Shively v. Bowlby*, 152 U.S. 1 (1894); *United States v. Utah*, 238 U.S. 64 (1931).

The requirements of "equal footing" extend beyond equality in sovereign power and regulatory authority, and include a measure of state-owned property rights (see *Smith v. Maryland*, 18 How. 71 (1855); and *United States v. Texas*, 339 U.S. 707 (1950)). Of course, this does not mean that each State must have an equal area or equal value in property, but merely that each State shall be accorded equivalent treatment under consistent and uniform principles.

In *United States v. Morrison*, 240 U.S. 192, 205 (1916), the court considered a school land grant to Nevada, and emphasized that all school land grants should be considered on an equal footing. To the same effect is *Heydenfelt v. Daney Gold & Silver Min. Co.*, 93 U.S. 634, 638 (1876).

As the lower court observed, with respect to revenues to support public schools, equal footing is achieved by a congressional grant designed to produce a fair and just settlement with the newly-admitted State in lieu of immunity from taxation of federal lands within the State, and by acceptance of the grant and the attendant trust restrictions by the State. It is this bilateral compact that "liquidates" the State's entitlement to public lands in lieu of taxing federal lands, and it is

thus the bilateral arrangement with the public land States that satisfies the requirements of constitutional equal footing.

3. *Bilateral Compact*

The Public Land Law Review Commission noted the bilateral nature of the federal school land grant program:

> Commencing with Ohio, the traditional requirement has been that the new public land states must adopt an "irrevocable ordinance" preliminary to admission to the Union in which they recognize the property rights of the United States in the public lands, and that all Federal property shall be immune from state taxation. In addition, the states have agreed not to tax transferees of Federal lands for a stated period and to tax nonresident ownerships the same as those of residents.
>
> In this sense, public land grants to states have not been strictly unilateral bounties, but rather important elements of bilateral compacts. (*One Third of the Nation's Land, A Report to the President and to the Congress by the Public Land Law Review Commission*, p. 244 (1970)).

The foregoing quotation is bottomed on sound judicial authority. In *Cooper v. Roberts*, 18 How. 173 (1855), the Supreme Court characterized a school land grant to Michigan as a "compact" between Michigan and the United States. And, in *United States v. Aikens*, 84 F.Supp. 260, 266 (1949), *aff'd. sub. nom.* 83 F.2d 192 (9th Circ. 1950), the court reviewed a considerable

number of cases, and concluded that railroad grants should be strictly construed, but that school land grants should be liberally construed because such grants:

> . . . are grants from one sovereign, the United States, to another sovereign, the State, for public, and not private purposes of profit, and are not subject to such narrow construction.

4. *Perpetuity and Solemnity of Trust*

The United States Supreme Court underscored the solemnity of the school trust obligation in 1967 when it decided *Lassen v. Arizona*, 385 U.S. 458 (1967). In that case the Land Commissioner of Arizona assumed that he could grant rights-of-way and material sites on school trust lands to the Arizona Highway Department without cash compensation to the school trust fund, if the highway would enhance the value of the adjoining school lands by a measure equaling or exceeding the value of the rights-of-way and material sites granted. The court held that the nature of the federal trust as created by the school land grants to the State prevented such action, and said that:

> . . . Arizona must actually compensate the trust in money for the full appraised value of any material sites or rights-of-way which it obtains on or over trust lands. (385 U.S. at 469).

The court further explained that:

> The lands at issue here are among some 10,790,000 acres granted by the United States to Arizona in trust for the use and benefit of designated public activities within the State. The Federal Government since the Northwest Ordinance of 1787 has made such grants to States newly admitted to the Union. Although the terms of these grants differ, at least the most recent commonly made clear that the United States has a continuing interest in the administration of both the lands and the funds which derive from them. The grant involved here thus expressly requires the Attorney General of the United States to maintain whatever proceedings may be necessary to enforce its terms. We brought this case here because of the importance of the issues presented both to the United States and to the States which have received such lands. (385 U.S. at 460-61).[12a]

The importance of this public trust has never been questioned by the courts. See *Alamo Land & Cattle Co., Inc., v. State of Arizona*, 47 L.Ed.2d 1 (1976).

5. *Utah Enabling Act: Congressional Conditions for Creation of the Public Trust for Public Schools*

The Utah Enabling Act was passed by Congress as the Act of July 16, 1894, 28 Stat. 107, and was entitled:

> An Act To enable the people of Utah to form a constitution and State government, and to be admitted into the Union on an equal footing with the original States.

[12a] **In Lassen v. Arizona, supra, this Court admonished the United States Attorney General "to maintain whatever proceedings may be necessary" to protect the integrity of the school trust grant to Arizona. Here, the Solicitor General asks this Court to cripple and diminish the school trust grant to Utah.**

With respect to the immunity of federal lands from taxation by the State, Section 3 of the Enabling Act authorized a convention to be convened for the purpose of forming a constitution and state government, requiring that:

> . . . said convention shall provide, by ordinance irrevocable without the consent of the United States and the people of said State . . . that the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof; and . . . that no taxes shall be imposed by the State on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use . . . .

Section 3 of the Enabling Act then proceeded to require the State of Utah, prior to statehood, to adopt an "ordinance irrevocable" for:

> . . . the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control.

Section 6 of the Enabling Act then provided:

> That upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two, and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any Act of Congress *other lands equivalent thereto . . . are hereby granted to said State for the support of common schools,* such indemnity lands to be selected within said State in such manner as the legislature may provide, with the approval of the Secretary of Interior . . . . (Emphasis added).

Section 10 of the Enabling Act then imposed the specific conditions on the use and disposition of the school land grant contained in Section 6:

> . . . the proceeds of lands herein granted for educational purposes, except as hereinafter otherwise provided, shall constitute a permanent school fund, the interest of which only shall be expended for the support of said schools . . . .

6. *Utah Constitution: Acceptance of the Public Trust*

Utah accepted the conditions and obligations of the federal grant to create a trust in aid and support of the public schools by providing in Section 3, Article X, of the Utah Constitution that such school lands and all proceeds derived therefrom:

> . . . shall be and remain a permanent fund, to be called the State School Fund, the interest of which only shall be expended for the support of the common schools.

Section 7, Article X, of the Utah Constitution further provided that:

> All public school funds shall be guaranteed by the State against loss or diversion.

Thus, the public trust for the support of Utah's public school system was created by the grant and at-

tendant conditions established by Congress in the Utah Enabling Act and the acceptance by Utah through the adoption of its Constitution.

7. *Summary*

The lower court repeatedly emphasized the special and substantial features of the school land grant trust. For example:

> The historical background we have heretofore referred to makes it clear that the school land grant statutes were enacted for a specific purpose. The strict "trust" conditions apply exclusively to the school lands granted the states or those selected "in lieu." No identical trust consequences or compact relationships exist with respect to other "lieu land" selections. (Secretary's petition, Appendix B, p. 33a).

Further, the lower court deemed it important to emphasize and quote in full the trial court's Conclusion of Law No. 3:

> *Conclusion No. 3:* Federal land grants in aid of the common schools of the State of Utah create a solemn and permanent public trust for the use, benefit and support of the public school system in Utah. This public trust was created by the United States, as settlor, granting to the State of Utah, as trustee, sections 2, 16, 32 and 36 within each township within the State of Utah for the permanent benefit of the Utah public school system, as beneficiary of the trust. The instruments which created this trust consisted of the Utah Enabling Act, 28 Stat. 107, as passed by the Congress of the United States, and the Constitution of the State of Utah, which accepted the terms of the trust, as ratified and adopted by the people of the State of Utah. (Secretary's petition, Appendix B, p. 28a).

With the foregoing background, it becomes easier to appreciate the unique significance of school trust land grants, and the importance that this Court has placed on school indemnity selections.

C. *Supreme Court Clarification of School Indemnity Selection Rights*

It will be recalled that, by virtue of Section 6 of the Utah Enabling Act, Congress not only granted to Utah four sections within each township for the support of the common schools, but further granted other lands "equivalent thereto" in lieu of any school lands originally granted to, but not received by, Utah. In addition to this specific indemnity grant to Utah, 43 U.S.C. 851 contains a basic indemnity grant and appropriation to all public land States entitled to school indemnity selections. So far as pertinent here, the relevant language provides that when original school grants in place do not pass to the States because of federal pre-emption or private entry prior to survey, then:

> . . . other lands of *equal acreage* are hereby *appropriated and granted*, and may be selected in accordance with the provisions of section 852 of this title . . . . (43 U.S.C. 851; Emphasis added).

Section 43 U.S.C. 852(a) provides that:

> The lands appropriated by section 851 of this title shall be selected from any unappropriated,

surveyed or unsurveyed public lands within the State . . . .

This Court reviewed the scope of discretion to be exercised by the Secretary of Interior when acting on indemnity selections in *Payne v. New Mexico*, 255 U.S. 367 (1921) and *Wyoming v. United States*, 255 U.S. 489 (1921). The lower court examined these decisions in some detail, as is shown from the following extracts from its opinion:

> Applying these rules of statutory construction, we hold that the District Court did not err. Furthermore, we believe, just as did the trial court, that the United States Supreme Court has, in two opinions, clearly and succinctly settled the statutory construction conflict presented here in favor of Utah. A detailed recital of these two opinions follows.
>
> Payne v. New Mexico, *supra*, involved a suit by New Mexico to enjoin the Secretary of the Interior and the Commissioner of the General Section of the Land Office from cancelling or annulling a "lieu land selection of that state under a mistaken conception of their power and duty." New Mexico did all that was needed to perfect the selection (just as here). The list was approved by the local land office and sent to the general land office. The list was accepted and approved. One year later the Commissioner directed that the selection be canceled "solely on the ground that in the meantime . . . the base tract . . . had been eliminated from the reservation by a change in its boundaries." The Secretary affirmed the Commissioner. The state appealed. Both offices proceeded on the basis that the validity of the selection was to be tested by

> conditions existing when they came to examine it and not by those existing when the state made the selection. The Supreme Court held that the conditions existing when the selection was made control. In so holding the Court said that the provision under which the selection was made (the "lost" lands and the "in lieu" lands were non-mineral in character) was one inviting and proposing an exchange of lands whereby the Congress said, in substance, to the state:
>
> > If you will waive or surrender your titled tract in the reservation, you may select and take in lieu of it a tract of like area from the unappropriated non-mineral public lands outside the reservation. Acceptance of such a proposal and compliance with its terms confer a vested right in the selected land which the land offices cannot lawfully cancel or disregard. In this respect the provision under which the state proceeded does not differ from other land laws which offer a conveyance of the title to those who accept and fully comply with their terms.
>
> 255 U.S., at p. 370.
>
> Again, in relation to the language "under the direction and subject to the approval of the Secretary of Interior" appearing in the statutes relating to lieu land selection, the Court in *Payne*, *supra*, noted its prior decision that a claimant to public land who has done all that is required under the law to perfect his claim acquires equitable title to the land which the Government then holds in trust for him. The Court said:
>
> > The words relied upon (subject to the approval of the Secretary of the Interior) are

> not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect to both the land relinquished and the land selected, and of approving or rejecting the selection accordingly.

255 U.S., at p. 371.

State of Wyoming v. United States, *supra*, involved a suit by the United States to establish title to 80 acres of land and to the proceeds of oil produced therefrom. One of the defendants, the State of Wyoming, claimed under a lieu selection made in 1912. It was against that selection and lease that the United States sought to establish title. Under the Act of July 10, 1890, Congress granted to Wyoming for the support of its common schools Sections 16 and 36 in each township as lands in place, with certain exceptions. The act of February 28, 1891, granted the state, in the event any of the designated lands in place should be included within a public reservation, the privilege to *"waive its right thereto and select in lieu thereof other lands of equal acreage from unappropriated non-mineral public lands outside the reservation and within the state.* See: California v. Deseret Water, Etc., Co., 243 U.S. 415 (1917); Payne v. New Mexico, *ante*, 367. Other laws of general application, §§441, 453, 2478, Rev. Stats. require that the selections be made under the direction of the Secretary of the Interior." (Emphasis supplied) 255 U.S., at 494.

The State of Wyoming selected the 80 acres in lieu of a tract which had passed to the State under the school grant which was included in a public reservation known as the Big Horn National Forest. The selected in lieu acreage "was vacant, unappropriated, and neither known nor believed to be mineral . . . . The State did everything necessary to show a perfect title to the land relinquished and perfect relinquishment thereof to the Government, and everything that was required either by statute or regulation of the Land Department . . . ." 255 U.S., at 494. The list remained in the General Land Office awaiting the consideration of the Commissioner for about three years. In the meantime, the selected land, and other lands, were included in a temporary executive withdrawal as possible oil land and thereafter the Commissioner declined to accept the selection made by the State of Wyoming and called on the State to either accept a limited surface right-certification or to show that the 80 acres was *still* not known or believed to be mineral. Wyoming claimed that it had been vested with equitable title when the selection was made. Accordingly, Wyoming refused the tender. The commissioner then canceled the selection on the theory that he was justified in rejecting it by reason of the subsequent withdrawal and oil discoveries in the vicinity. The Secretary of Interior affirmed the Commissioner. In the meantime, Wyoming had issued an oil lease on the selected tract. The oil company (lessee) drilled and obtained successful production of oil some four years after the selection. The Supreme Court posed the issue presented as:

> The question presented is whether, considering that the selection was lawfully made in lieu of the state-owned tract contemporaneously relinquished, *and that nothing remained to be done by the State to perfect the selection, it was admissible for the Commissioner and the Secretary to disapprove*

and reject it on the ground that the selected land was withdrawn two years later under the Act of June 25, 1910, or still later *was discovered to be mineral land,* that is, to be *valuable for oil.* (Emphasis supplied.)

255 U.S., at p. 496.

The Court held that once Wyoming had complied with lawful "in lieu" selection procedures, there was no power conferred in the Commissioner or the Secretary to withhold the approval in the sense of granting or denying a *privilege to the state,* but rather:

> *. . . of determining whether an existing privilege conferred by Congress had been lawfully exercised; — in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the State in 1912.* If these were valid then — if they met all the requirements of the *congressional proposal,* including the directions given by the Secretary — they remained valid *notwithstanding the subsequent change in conditions. Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.* (Emphasis supplied.)

255 U.S., at pp. 496, 497.

The Court equated the "in lieu" selection to a

cash entry, citing to Benson Mining Co. v. Alta Mining Co., 145 U.S. 428 (1892), for the proposition that when the price is paid the right to the patent immediately arises and the delay in the Land Department relative to administrative processing does not diminish the rights flowing from the purchase. Further, the Court made special reference to its decision in Daniels v. Wagner, 237 U.S. 547 (1915). There the Secretary rejected a lieu selection and ruled that no right attached under the selection unless and until it was approved by him and that he possessed a discretion to reject it and give effect to an intervening change in conditions. The Court did not accept the Secretary's position. The Court held that when selections were made in accord with statutes it was the plain duty of the Secretary to approve them and *that the Secretary's power to approve the lists of selection was judicial in its nature.* 255 U.S., at pp. 502, 503. The most telling, significant and pertinent language of the Supreme Court opinion in State of Wyoming v. United States, *supra,* directly applicable to the contention raised by the Secretary here that the "value for value" criteria is to be employed in approving the "in lieu" selection at issue is:

> . . . If these (selections of the "in lieu" lands) were valid then (when the selection lists were submitted) . . . they remained valid notwithstanding the subsequent change in conditions (i.e., discovery of oil and production thereof). Acceptance of such a proposal and full compliance therewith confer vested rights which all must respect. Equity then regards the State as the owner of the selected tract and the United States as owning the other; and this equitable ownership

> carries with it whatever advantage or disadvantage may arise from a subsequent change in conditions whether one tract or the other be affected.

255 U.S., at p. 497.

We believe that until and unless there is commercial production of minerals there is really no definitive means or method of ascertaining comparative *value* of tracts which are "mineral in character." The Supreme Court obliquely recognized this, *supra*, by reference to "whatever advantage or disadvantage may arise from a subsequent change in condition whether one tract or the other be affected."

Thus, we conclude that the solemn bilateral agreement between the United States and the "Land Grant" State of Utah included the unqualified, unambiguous *right* of Utah, upon incorporation in its Enabling Act of the waiver heretofore referred to, coupled with Utah's acceptance of the trust conditions and obligations set forth under Sections 3 and 7, Art. X of its Constitution, to select "in lieu" school indemnity lands which are "mineral in character" but lost to the State. There is no legislative criteria limiting or defining the term "mineral in character." Thus all that is required is that both the "lost" lands and the "in lieu" lands have some identifiable "mineral in character." The Secretary argues, it seems, that the affected "Land Grant" states are to be bound without exception to the stringent trust obligations they have assumed in their administration of the "school lands" granted—or those selected "in lieu"—while the United States Government is not bound to the performance of those covenants it agreed to in consideration for

> Utah's waiver. We reject this contention. It is unreasonable and contrary to the solemn covenant of the United States Government; it is also in derogation of the plain language employed by the Supreme Court in State of Wyoming v. United States, *supra*. (Secretary's petition, Appendix B, pp. 41a-48a; Emphasis in opinion).

The Secretary argues, however, that the Taylor Grazing Act has rendered the *Payne* and *Wyoming* cases inapplicable to the current conflict. It is time to examine that contention.

D. *Inapplicability of the Taylor Grazing Act of 1934*

The Taylor Grazing Act was enacted by Congress in 1934 as H.R. 6462, Public Law No. 482, of the 73rd Congress, Second Session, Act of June 28, 1934, 48 Stat. 1269, now codified as 43 U.S.C. 315 *et seq*. There is no conceivable way in which the Taylor Grazing Act of 1934 can be construed to confer upon the Secretary of the Interior authority to "classify" lands within a grazing district as a condition precedent to the selection of such lands by a State as indemnification for lost school lands.

There is nothing in the language of the act itself, or in its legislative history, that remotely suggests that it is to have any application to state school indemnity selections. The Taylor Grazing Act of 1934 was entitled:

> AN ACT To stop injury to the public grazing lands by preventing overgrazing and soil deterior-

> ation, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes. (48 Stat. 1269).

A careful reading of the entire act reveals that it was in fact designed to control and regulate grazing on the public lands. Section 7 of the act—the provision which the Secretary cites as the source of his "classification" authority—provided in pertinent part that:

> . . . the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry . . . .

The above provision is entirely clear. The Secretary was authorized and required to classify lands located within grazing districts established under the act before such lands could be opened to entry for homesteading. In so doing, the Secretary was guided by a basic criterion — whether the land under examination had a higher and more beneficial use for the production of crops (homestead use) than for livestock grazing of native grasses and forage plants (the grazing use if the land was retained in federal ownership). The clear congressional instruction was that lands within grazing districts should be classified for homestead entry if their

potential for agricultural crops exceeded their value for grazing, and to deny such classification if grazing appeared to be the more valuable use.

But it is nothing short of ludicrous to suppose that this statutory language, by any stretch of the imagination, could be construed to authorize or require the Secretary to classify lands within a grazing district as a condition precedent to selection by a State in satisfaction of its school indemnity rights. The Secretary had no authority under the 1934 Act to classify lands for any use or purpose other than grazing or homesteading.

Thus, the 1934 Act is a horse quickly curried. It is the 1936 Amendment to that act which the Secretary construes as providing a procedure for "unlocking" lands withdrawn for classification under Executive Order No. 6910, and as the source of almost unlimited authority on his part to determine when federal lands shall be retained in federal ownership and when they shall be available for school indemnity selection.

E. *Inapplicability of the 1936 Amendment to the Taylor Grazing Act*

1. *Legislative History of the 1936 Amendment*

Representative Taylor of Colorado was the sponsor of the original Taylor Grazing Act of 1934, and when his bill (H.R. 6462) was originally introduced in 1934 it purported to authorize 173,000,000 acres of pub-

lic domain to be included within grazing districts so that the public range lands could be regulated, managed and protected. The bill was amended, however, and the final enactment reduced the allowable acreage to a maximum of 80,000,000 acres (see Section 1 of 48 Stat. 1269).

Then, in 1936, Representative Taylor introduced H.R. 10094 in the 74th Congress, Second Session, to increase the allowable acreage within grazing districts by amending Section 1 of the 1934 Act, and this bill was enacted into law as the 1936 Amendment to the Taylor Grazing Act (49 Stat. 1976). But, before examining the specific language of the 1936 Amendment, Representative Taylor's explanations on the floor of the House as to the purpose of H.R. 10094 are illuminating:

> I want to digress a moment to say that the original bill as I introduced it [referring to H.R. 6462, which became the 1934 Act] applied to all of the remaining vacant, unappropriated, and unreserved land of the public domain of the United States, at that time estimated at 173,000,000 acres, and the bill passed the House in that form. One of the hamstringing amendments added by the opponents of the bill during 3 months' debate in the Senate reduced the acreage to which the law could be applied to 80,000,000, leaving the remaining half of the public domain open to free exploitation, as it has been ever since.
>
> Realizing the ruinous absurdity of this condition and the inevitable and rapid destruction of the remaining unprotected public land, the chairman of the Public Lands Committee of the House,

> Mr. De Rouen, of Louisiana, at the opening of Congress in January 1935, introduced a bill making all public land subject to the provisions of this grazing-district law. The opponents of the law again loaded that bill with so many injurious amendments that the President was compelled to and did veto it.
>
> Soon after the opening of this session of Congress I introduced another bill (H.R. 10094) merely amending the Taylor Grazing Act by increasing the amount of public lands, subject to its provisions, from 80,000,000 acres to 143,000,000 acres and making no other change in the law—just changing the figure 80 to 143. The bill passed the House unanimously March 16. It remained peacefully in the Public Lands Committee of the Senate from that time until last Monday, the 15th of June, when it was reported out with five riders amending other sections of the law and adding a new section.
>
> While I somewhat doubt if any of these proposed new provisions should or could pass either the Senate or the House on their own merits in an independent bill, nevertheless I hope the bill will pass even in that form and become a law before this session of Congress adjourns. Otherwise the remaining public domain that is not already practically destroyed will very soon be utterly ruined by overgrazing and tramping out all the verdure on it. (Cong. Record, Vol. 80, Part 10, 74th Cong., Second Sess., House of Rep., June 19, 1936, at pp. 10281-82).

There is no further explanation in the proceedings in the House of Representatives to shed any light on the meaning intended by the amendments added by the Senate. Representative Taylor had earlier explained the

purpose of his bill (H.R. 10094) on the floor of the House on Mrach 16, 1936:

> *Mr. Taylor of Colorado.* Mr. Speaker, the object of this bill is to bring all the remaining public domain under the provisions of the Taylor Grazing Act that was enacted into law June 28, 1934 (48 Stat. 1269). The way the bill passed the House in the spring of 1934 it applied to all the remaining public domain in the United States. The bill was amended in the Senate limiting its application to only 80,000,000 acres of vacant, unappropriated, and unreserved lands of the public domain. This bill only changes one word in that law. It extends that limitation of 80,000,000 to 143,000,000 acres and will enable all the Western States to come in and put all of their remaining public lands under this law if they desire to do so.
>
> *Mr. Greever.* I should like to ask the gentleman, Is the bill properly safeguarded so that the rights of the States to exchange their lands for lands of the United States are preserved?
>
> *Mr. Taylor of Colorado.* This bill makes no change whatever in the existing law except in one word. It changes eighty to one hundred and forty-three. That is in the first section of the present law. (Cong. Record, Vol. 80, Part 4, 79th Cong., Second Sess., House of Rep., March 16, 1936, at page 3815).

The legislative history of H.R. 10094 in the Senate sheds relatively little light on the intended meaning of the 1936 Amendment. On June 15, 1936, Senate Report No. 2371 was ordered to be printed by the Committee on Public Lands and Surveys, 74th Cong., Second Sess., and that report declares, with respect to Section 7, that:

> It is proposed to amend section 7 of the Taylor Grazing Act so as to provide a more practical and satisfactory method of classification of lands within a grazing district and to make available for private entry lands which are more valuable for other purposes than grazing.

The next to the last paragraph of that Report, as it appears on page 3, summarizes the intended effect of H.R. 10094 in the following language:

> It should be understood that the raising of the limitation will not impair any of the other provisions of the law. Exchanges of State or privately owned land can be continued.

Just four days later, without any intervening discussion or debate, the bill was passed without objection or discussion. Senator Adams said:

> Mr. President, I ask unanimous consent for the immediate consideration of House bill 10094. A few moments ago I endeavored to secure unanimous consent for its consideration, but the Senator from Oregon [Mr. McNary] then said he would not permit consideration of any legislation until the general unanimous-consent agreement had been carried out. He said there was no objection to the bill except that he did not want to interfere at that time with the program. *There will be no discussion about the bill.* It is important that it should go to the House and have an amendment concurred in there.

There was no objection and unanimous consent was given for consideration of the bill, and:

> The amendment was agreed to. The amendment was ordered to be engrossed and the bill to be read a third time. The bill was read a third time, and passed. (Cong. Record, Vol. 80, Part 10, 79th Cong., Second Sess., Senate, June 20, 1936, at pp. 10479-80; Emphasis added).

There is no further legislative history, either in the House or the Senate, that offers any further illumination as to the meaning intended by Congress in the 1936 Amendment to Section 7 of the Taylor Grazing Act. Even though the legislative history of the 1936 Amendment is rather slim, it is absolutely clear that every word and every reasonable implication of that history makes clear that the amendment was intended to be confined to the basic purposes and scope of the original act of 1934 — and there is not the slightest justification for supposing that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the 1936 Amendment.[13] And

[13] And in 1966, when Congress amended 43 U.S.C. 852 to allow States to select unsurveyed lands, and also to select lands as indemnity for lands lost after survey but before creation of the State, the Senate Interior & Insular Affairs Committee underscored and reaffirmed the importance of discretion on the part of the State in making indemnity selections:

> . . . there is no reason why a State should not be indemnified and receive the full grant of lands lost through no fault of its own regardless of when the loss took place. Nor is there reason to restrict selection of land from among those lands that have been surveyed. The survey of public lands is continuing; but many areas remain unsurveyed.
>
> **The present choice to be exercised by a State in seeking indemnity lands is limited because of the large acreage**

it is also absolutely clear that the 1936 Amendment was in no way prompted by any need to provide a mechanism for "unlocking" lands withdrawn for classification under Executive Order No. 6910. In light of this legislative history, the Secretary should in good faith abandon his preposterous argument. It is now appropriate to examine the exact language of Section 7 as amended in 1936.

2. *Text of the 1936 Amendment*

It will be noted that Section 7 (now codified 43 U.S.C. 315(f)), recites that the Secretary is authorized to classify lands within a grazing district to determine whether such lands are:

> . . . proper for acquisition in satisfaction of any outstanding *lieu* . . . rights or *land grant*, and to open such lands to . . . *selection* . . . for disposal in accordance with such classification under applicable public-land laws . . . . Such lands shall not be subject to disposition . . . until after the same have been classified and opened to entry . . . . (Emphasis added).

[13] **Continued**

> **which remains unsurveyed.** This tends to militate against principles of good land management, particularly in terms of consolidating viable blocks suitable for development. (Senate Report No. 1213, 89th Cong., Second Sess., 1966; Emphasis added).

Thus, as the Senate Committee made clear, the basic limitation on the state's school indemnity selection discretion was the fact that much of the public domain was unsurveyed—and that restriction was removed. The reference to the obstacle that militated against "principles of good land management" was, of course, to the limited amount of federal land available for selection by the States, so as to prevent the acquisition of manageable blocks of land rather than isolated tracts—and was not a reference to any interference with federal land management resulting from State school indemnity selections.

It is the above language that is relied on by the Secretary as his source of authority for classifying land prior to the exercise by a State of its school indemnity selection rights, and that matter will now be examined.

3. *Reasons Why the 1936 Amendment is not Applicable to School Indemnity Selections*

There are a number of compelling reasons why the 1936 Amendment should not be construed so as to authorize or require the Secretary of Interior to classify lands within a grazing district as a condition precedent to their selection by a State in satisfaction of school indemnity rights. Some of these reasons are summarized below:

a. *Express Exemption for School Indemnity Selections*

The 1936 Amendment to the Taylor Grazing Act did not amend the exemptions contained in Section 1 of the 1934 Act, and those exemptions (now codified in 43 U.S.C. 315) include school land grants:

> *Nothing in this chapter shall be construed* in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this chapter, nor *to affect any land heretofore or hereafter surveyed which, except for the provisions of this chapter, would be a part of any grant to any State*, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. (Emphasis added).

Thus, it is clear that nothing in the Taylor Grazing Act is to be construed as "affecting" the disposition of any land that would be a part of any grant to any State. It has already been shown that school indemnity lands are express "grants" to the States. Indeed, Section 6 of the Utah Enabling Act, 28 Stat. 107, provided that Utah's school indemnity lands "are hereby granted to said State for the support of the common schools", and 43 U.S.C. 851 provides that school indemnity lands "are hereby appropriated and granted".

It seems beyond dispute that school land grants are beyond the reach of the Taylor Grazing Act, and the only relevant question would seem to be whether there is some other provision in that act which expressly contradicts the exemption for "any grant to any State." As will be seen, there is no such contradiction.

b. *Classification Required Only for Private Entries*

As already noted, Section 7 of the 1936 Amendment contains the language relied on by the Secretary as his sole source of authority for classifying school indemnity selections to release them from the "locked up" status they allegedly acquired by being withdrawn for classification by Executive Order No. 6910. But that language of the act clearly seems to apply only to private rights and entries on the public domain. The relevant language in Section 7 provides that the Secretary is authorized to classify lands within a grazing district to determine whether such lands are:

> . . . proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . . *Such lands* shall not be subject to disposition . . . *until after the same have been classified and opened to entry* . . . . (Emphasis added).

It thus cannot be questioned that Congress intended the classification procedure to be a condition precedent to "entries" on the public lands; and it is difficult to see how "entries" can reasonably be construed to include land grants to the States, particularly in view of the express exemption in Section 1 of the act. A careful reading of the entire text of Section 7 suggests that Congress was concerned with *private* entries, since the primary focus was on homestead entries — even though the act, as amended in 1936, is broad enough to include any private "lieu, exchange or script rights or land grant."

The references to "lieu" rights, the process of "selection" of lands, and "land grants" under other statutes cannot reasonably apply to school indemnity selections. Many federal statutes have made *land grants* to private persons and entities, and have provided for *selection* of *lieu* lands by such private persons and entities. Illustrative examples would be the lieu selection rights of railroads under 43 U.S.C. 888, 890; 25 U.S.C. 334 (selection rights of Indians not residing on reservations); 43 U.S.C. 149 (private rights of selection when private lands are included within an extension of an Indian Reservation); and 43 U.S.C. 274 (selection rights of

veterans). Thus, it is clear that the pertinent language in Section 7 of the Taylor Grazing Act refers to land grants, lieu rights, and selection procedures as they pertain to *private* persons and entities, as distinguished from the rights of the States to make school indemnity selections.

This conclusion is reinforced by the fact that Section 7 made an express exemption for "locations and entries under the mining laws . . . ." Mining locations are, of course, private entries, and they are the only *entries* exempted by Section 7. It must be remembered that Section 1 of the act exempted school land grants *from the entire reach of the act*, whereas Section 7, which deals only with classification, exempted mining locations *from the classification requirements of the act.* It is conceivable that if Congress had not exempted school land grants from the act under Section 1, there might have been some justification for providing such an exemption under Section 7 from the classification requirements. But, since Section 1 had already exempted school land grants from the act, and since Section 7 extended only to private "entries" on public lands, it would have been illogical to have made a further express exemption of school land grants under Section 7.

It would thus seem to be crystal clear that Section 7 requires classification only for *private* "entries" on the public domain, and that no disposition may be made of the public domain until the land has first been classified and "opened to entry." While no further support for this conclusion is needed, it does not seem to

be amiss to note that Congress expressly explained that Section 7 was to apply only to *private* entries:

> It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to make available *for private entry* lands which are more valuable for other purposes than grazing. (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at page 2; Emphasis added).

It is of significance that the above quotation is from the legislative history of the 1936 Amendment, which the Secretary relies on exclusively as his source of authority for classifying school land grants under Section 7.

In brief summary, it may be said that:

(1) Section 1 of the Taylor Grazing Act expressly exempts school land grants from all parts of the act;

(2) Section 7 requires classification of all lands within a grazing district before such land will be open to *private* entry and disposition; and this construction is further compelled because:

(a) Section 7 expressly deals with various types of private entries and expressly exempts mining claims (private entries) from classification;

(b) Section 7 expressly prohibits disposition of lands within a grazing district until the same have been classified and opened to *entry;*

(c) Congress said, in amending the Taylor Grazing Act in 1936, that the classification requirement extended only to *private* entries; and,

(d) There is not *one word*, anywhere, in the Taylor Grazing Act or in its legislative history that is inconsistent with the clear congressional intention to exempt school land grants from that act and to require classification of public lands within grazing districts prior to *private* entry.

c. *Judicial Authority Exempts School Indemnity Selections*

There are no cases other than the decisions of the trial court and court of appeals in this case, which have ruled directly upon the question as to whether school indemnity selections are subject to classification under Section 7 of the Taylor Grazing Act, but several cases implicity confirm that Section 7 requires classifications only for *private* entries and not for indemnity selections.

For example, *Carl v. Udall*, 309 F.2d 653 (D.C. Circ. 1962), seems to hold that classification under Section 7 is required for *private* selection of lieu lands to replace lands which conflicted with an early railroad grant. Similarly, *Lewis v. Hickel*, 427 F.2d 673 (9th Circ. 1970), held that the Secretary had broad discretion under Section 8 of the Taylor Grazing Act in deciding whether to approve *exchanges* of land. The important point, however, is that the Circuit Court observed that the Taylor Grazing Act had nothing to do

with school indemnity selections. It will be remembered that *Payne v. New Mexico*, 255 U.S. 367 (1921), sustained the validity of the state's school indemnity selection under 43 U.S.C. 851-52; and in *Lewis v. Hickel, supra*, the Court distinguished such school indemnity selections from exchanges under the Taylor Grazing Act:

> *Payne v. New Mexico* involved the Secretary's denial of an exchange under an Act granting New Mexico the right to select certain lands for the support of common schools. *However, that case and others like it are inapposite since they arose under statutes granting interests in lands once certain conditions had been complied with* . . . . Under the Taylor Grazing Act the power conferred on the Secretary is much broader than that of determining if the applicant has met the conditions prescribed by Congress. (427 F.2d at 676; Emphasis added).

While the above statement is only dictim, it is entirely clear that the Court viewed *Payne v. New Mexico* and the school indemnity statutes as "inapposite" to the Taylor Grazing Act because the indemnity statutes conferred absolute rights if the selections were filed in accordance with applicable statutory criteria, whereas the Taylor Grazing Act conferred broader discretion on the Secretary of Interior. This is extremely significant. *Lewis v. Hickel* was decided in 1970, some thirty-four years after the 1936 Amendment to the Taylor Grazing Act. Surely if the Circuit Court had thought that the Taylor Grazing Act had amended, changed or otherwise affected school indemnity selection rights, then it would have said that *Payne v. New Mexico* was inapposite *because the statutes therein construed had been changed* by the Taylor Grazing Act. But the Court did not say that — it said that *Payne* was inapposite to the Taylor Grazing Act because it was decided under entirely different statutes.

Other cases illustrate exactly the same point. Thus, in *Wilcoxson v. United States*, 313 F.2d 884 (D.C. Circ. 1963), the plaintiff cited *Wyoming v. United States, supra*, in support of his right to a patent under the Isolated Tracts Act. *Wyoming v. United States*, like *Payne v. New Mexico*, had construed the school indemnity selection statutes in favor of the State to compel the Secretary of Interior to approve the state's school indemnity selection. The Court distinguished the Secretary's ministerial duty under the selection statutes from his broader discretionary authority under the Isolated Tracts Act. Speaking with reference to *Wyoming v. United States*, the Court said:

> We agree with the court below that such cases are inapposite since they arose under statutes different from the Isolated Tracts Act. *In those statutes Congress chose a method of granting interests in public lands whereby the recipients of the grants had only to prove they met the statutory requirements in order to obtain rights to the lands.* Hence, the power confided to [the Secretary] was not that of granting or denying a privilege . . . but of determining whether an existing privilege conferred by Congress had been lawfully exercised. But in the Isolated Tracts Act Congress chose a wholly different method for disposing of interests in the public domain

> . . . . Congress entrusted to the Secretary's discretion the initial decision whether or not to sell isolated tracts of the public domain. The distinction is between a positive mandate to the Secretary and permission to take certain action in his discretion. (313 F.2d at 888; Emphasis added).

The point of present emphasis is not the range or nature of the Secretary's discretion, but, rather, the fact that the Court distinguished the *Wyoming* case on the ground that it had been decided under separate statutes which conferred absolute rights of school indemnity selection on the States if the selections satisfied the statutory requirements. Again, the *Wilcoxson* case was decided in 1963, some twenty-seven years after the 1936 Amendment to Section 7 of the Taylor Grazing Act, and if the Court had thought that the latter statute had changed the nature of school indemnity selection rights, it would have distinguished the *Wyoming* case on that ground. But it didn't! The language of the opinion is very clear to the effect that the Court considered school indemnity selection rights to be the same in 1963 as in 1921 (when the *Wyoming* case was decided).

Ferry v. Udall, 336 F.2d 706 (9th Circ. 1964), also illustrates the same point. The issue was the same as in the *Wilcoxson* case, and, in distinguishing the *Wyoming* case, the Court said:

> The Supreme Court held that the statutes constituted an offer to Wyoming, the compliance with which became mandatory once the State accepted the offer in accordance with the statutes. The discretion of the Department of Interior was limited solely to determining whether the statutory conditions had been met. (336 F.2d at 713).

Once again, if the Court had thought that the *Wyoming* case was no longer good law as a result of any change or impact arising from the Taylor Grazing Act, it would have noted that fact. But it didn't! The Court clearly indicated that in 1964 it believed the *Wyoming* case still to be of full force and effect, but distinguished it on the ground that it construed the school indemnity statutes and not the statute then before the Circuit Court.

Thus, while there is no square holding (other than the decisions below) to the effect that the Taylor Grazing Act has no application to school indemnity selections, the cases clearly and uniformly suggest that the school indemnity rights of the States under 43 U.S.C. 851-52 have not been diminished or impaired, that the Secretary's range of discretion has not been enlarged, and that *Payne v. New Mexico* and *Wyoming v. United States* continue to be the controlling law with respect to the States' rights of selection and the Secretary's duty to approve the selections if they comply with the statutory criteria of 43 U.S.C. 852. And the court below expressly so held.

d. *Legislative History Confirms Exemption of School Indemnity Selections*

The legislative history of the 1936 Amendment to Section 7 of the Taylor Grazing Act, as discussed in Section III.E.1 of this brief, *supra*, clearly demon-

strates beyond doubt that Congress did not intend to give the Secretary of Interior discretionary authority to deny school indemnity selections under the guise of classifying land within grazing districts.

To put it directly, it plainly and simply is unthinkable that Congress would have intended to limit or restrict school indemnity selection rights in any way through the enactment of the 1936 Amendment. That amendment was sponsored and supported by congressmen from the western public-land States — the very States that depended so heavily on school land grants and indemnity selection rights. How can any reasonable mind suppose that Congress intended to weaken, restrict or limit the school indemnity selection rights *without one word, anywhere,* in any part of the legislative history that even remotely suggests or hints that such selection rights would in any way be affected? To the contrary, Representative Taylor repeatedly emphasized that the 1936 Amendment was to do nothing more than enlarge the acreage encompassed by the act, that the rights of the States would not be disturbed or diminished, and that Section 7 as revised required classification only for private entries.[14]

[14] There are several additional elements of simple logic that suggest that school indemnity selections are exempt from classification under Section 7 of the Taylor Grazing Act. While these matters need not be developed in the text of this brief, it does seem appropriate to summarize them in this note.

First, the purpose and thrust of the classification process authorized by Section 7 of the 1936 Amendment is to determine whether lands within a grazing district are adaptable to "uses" which have a higher value than grazing. The Secretary is authorized:

> . . . to examine and classify any lands . . . within a grazing district, which are more valuable or suitable for

e. *Exchanges Exempt under Section 8(c)*

Section 8(c) of the Taylor Grazing Act (43 U.S.C. 315g(c)), also amended by the 1936 Amendment, authorizes *exchanges of* state-owned lands for federal lands located within a grazing district. These exchanges are exempt from classification under Section 7. It would be ridiculous to suppose that Congress would

[14] Continued

> the production of crops than for the production of native grasses and forage plants, **or more valuable or suitable for any other use than for the use provided for under this Act.** . . . (Emphasis added).

School indemnity selections are not proposed "uses" of land. They are selections for the transfer of title; and, after acquiring title, the State may put the land to whatever use it sees fit, so long as the terms and purposes of the school trust are observed. Thus, school indemnity selections involve no "uses" for the Secretary to evaluate to determine whether such uses are more valuable than the grazing use, and for this reason the "classification" procedures of Section 7 could not apply to such school indemnity selections.

A second observation is that Section 7 of the 1936 Amendment provides that lands within a grazing district shall not be disposed of until they are classified and opened to **entry.** School indemnity selections are not "entries" in the traditional sense, and have never been considered to be. It is thus illogical to assume that the classification procedures of Section 7 were intended to be a condition precedent to filing school indemnity selections.

A third practical reason why the 1936 Amendment does not apply to school indemnity selections is that the Amendment only applies to "unappropriated" federal lands, and school indemnity selection lands had previously been "appropriated" for school trust purposes. Thus, 43 U.S.C. 851 clearly provides that when original school grants in place do not pass to the State because of federal pre-emption or private entry prior to survey, then:

> . . . other lands of equal acreage are hereby **appropriated and granted,** and may be selected in accordance with the provisions of section 852 of this title . . . . (43 U.S.C. 851; Emphasis added).

Section 1 of the Taylor Grazing Act, as it presently appears in 43 U.S.C. 315, provides that:

> . . . the Secretary of Interior is authorized, in his discretion, by order to establish grazing districts or addi-

exempt such land "trades" from classification, but would, at the same time, relegate school indemnity selections to a lower status than land trades, thus requiring school indemnity selections to be subject to classification.

The final paragraph of Section 8(c) provides:

> For the purpose of effecting exchanges based on lands of equal acreage the identification and area of unsurveyed school sections may be determined by protraction or otherwise. The *selection* by the State of lands in *lieu* of any such protracted school sections shall be a waiver of all of its right to such sections. (Emphasis added).

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[14] **Continued**

> tions thereto and/or to modify the boundaries thereof, of vacant, **unappropriated**, and unreserved lands from any part of the public domain of the United States . . . . (Emphasis added).

Since the Secretary's administrative jurisdiction over federal lands in grazing districts is limited and confined to "unappropriated" public lands, and since Congress specifically "appropriated" all lands necessary to satisfy school indemnity selection rights prior to enactment of the Taylor Grazing Act, it necessarily follows that the Secretary has no authority to "classify" appropriated lands to determine whether they are suitable for school indemnity selection. The Taylor Grazing Act simply does not apply to any school indemnity lands, even though they may be located within a grazing district.

A fourth point of logic is that even if it should be assumed, arguendo, that the language of Section 7 of the 1936 Amendment could be tortured and strained so as to apply to school indemnity selections, it seems clear that any withdrawals or classifications under that statute would be subject and subordinate to the prior "appropriation" of lands for school indemnity selection by virtue of 28 Stat. 107 (Utah Enabling Act) and 43 U.S.C. 851-52.

A fifth practical observation is that even if Section 7 of the 1936 Amendment to the Taylor Grazing Act could be construed as "withdrawing" or "reserving" public lands so as to require classification of school indemnity lands prior to disposition, it is clear that such lands were not "appropriated" by said Section 7. Since the States have a direct statutory right to select any "unappropriated" lands from the public domain, it is quite obvious that such school indemnity selections may be made without regard to the classification procedures (or any other provisions of) the Taylor Grazing Act. Specifically, 43 U.S.C. 852(a) provides that:

> **The lands appropriated by section 851 of this title, shall be selected from any unappropriated, surveyed or unsurveyed public lands within the State where such losses or deficiencies occur . . . . (Emphasis added).**

The lieu selections mentioned in the above statute must be distinguished from school indemnity selections. The exchanges authorized by Section 8(c), so far as school lands are concerned, are the *original school grants in place*, where the State has received title, or is authorized to receive title at the date of survey. In short, these are school sections that *have not been denied to the State* by federal pre-emption or private entry prior to survey. They are not indemnity lands.

School indemnity selections, on the other hand, are of an entirely different character. A State is entitled to indemnity lands *only when* original school grants in place are denied to the State by virtue of federal pre-emption or private entry prior to survey. For that reason, the grant and appropriation in 43 U.S.C. 851, and the restrictions and limitations on the exercise of the grant as set forth in 43 U.S.C. 852, relate and apply only to school *indemnity* selections in lieu of lost school lands. And, by contrast, the exchanges of school lands in place (the original school grants) as authorized by Section 8(c) of the Taylor Grazing Act (43 U.S.C. 315g(c)), are governed and controlled by said Section 8(c).

The Secretary's applicable regulations for exchanges under Section 8(c) are found in 43 C.F.R.

2210. In particular, Regulation 2211.0-3(b) (2) provides that:

> State exchanges are not subject to the classification requirements of Group 2400 of this chapter.

In view of the fact that school indemnity lands have been granted to the States by Congress to create a solemn public trust, and in view of the language of the Taylor Grazing Act and its legislative history, it is absurd to think that school indemnity selections are subject to the classification requirements of Section 7 of the Taylor Grazing Act while land trades and exchanges under Section 8(c) are exempt. The Secretary would be hard put to advance a rational reason for such an absurd result.

By way of comparison, it might be noted that exchanges of private lands for federal lands are authorized under Section 8(b) of the 1936 Amendment, 43 U.S.C. 315g(b). With respect to these exchanges, the Secretary has rather broad discretionary authority, and must determine whether the "public interests" will be advanced by any such exchange. Private exchanges are subject to classification under 43 C.F.R. 2400.0-3(b) and 43 C.F.R. 2200. This seems to be consistent with *Lewis v. Hickel*, 427 F.2d 673 (9th Circ. 1970). It is also fully consistent with the arguments advanced by Utah in this brief, particularly with respect to the observation that Section 7 of the Taylor Grazing Act applies only to *private* entries, exchanges and selections.

This is to say that private exchanges under Section 8(b) are subject to classification under Section 7, but state exchanges under Section 8(c) are not. Again, the Secretary would be hard put to advance a rational basis for his argument that school indemnity selection rights should be equated with private land exchanges by subjecting both to Section 7 classification procedures.[15]

f. *Exchanges under Section 8(c) Mandatory*

The exchanges under Section 8(c) of the 1936 Amendment to the Taylor Grazing Act, as discussed above, are *mandatory*, and the Secretary is obligated to approve land exchanges proposed by the States. That provision declares that whenever any State files an application to exchange state-owned land for federal land, that:

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[15] The Secretary has not explained how lands "exchanged" under Section 8(c) escaped from the alleged confinement of the withdrawal for classification under Executive Order No. 6910. Presumably it is the language of Section 8(c) itself that the Secretary would construe as serving to "unlock" lands from Executive Order No. 6910 and exempting such lands from "classification" under Section 7.

But this merely illustrates, once again, how the Secretary's irrational administrative interpretations would stand the Taylor Grazing Act on its head. On the one hand there are the simple land trades, where prior to 1936 the States had no rights of exchange but merely requested the Government to approve such exchanges as proposed by the States. With respect to these trades, the Secretary now argues (or at least seems to concede) that Section 8(c) of the Taylor Grazing Act did marvelous things for the States: (1) It "unlocked" lands proposed for exchange from Executive Order No. 6910; (2) it exempted such exchanges from the "classification" requirements of Section 7; (3) It virtually mandated the Secretary to approve trades proposed by the States, giving the Secretary practically no discretion to reject such proposals; and (4) it mandated the Secretary to cooperate with the State so as to effectuate the exchange at the "earliest practicable date."

> . . . the Secretary of Interior *shall, and is hereby, directed to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end* . . . . (Emphasis added).

Section 8 of the 1934 Act had merely provided, in substance, that exchanges of state-owned land would proceed in "the same manner" as exchanges of privately owned land. The Senate Report on H.R. 10094, which was enacted into law as the 1936 Amendment, observed that the purpose of amending Section 8 was "to make mandatory the exchange of lands upon the application of a State owning lands within a grazing district, and otherwise to perfect the section." (Senate Report No. 2371, 74th Cong., Second Sess., June 15, 1936, at p. 2).

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[15] **Continued**

But, with respect to the solemn bilateral compacts that resulted in the school trust grants, the Secretary claims that Congress acted in a cavalier and reckless manner. Under Section 7 of the Taylor Grazing Act, the Secretary says, Congress: (1) Left lands selected by States for school indemnity locked firmly within the grasp of Executive Order No. 6910, to be released only upon a favorable "classification" by the Secretary; (2) refrained from establishing any guidelines, criteria or policy of whatsoever nature for such "classification", but left to the Secretary unbridled discretion to reject indemnity selections at will, and to consider anything at all that he deemed relevant to determine whether the selected lands were "suitable" for selection; (3) refrained from directing the Secretary even to take any action at all on school indemnity selections, so that, as is the case here, the Secretary could wait for fourteen years without acting on the selections.

Of course, Congress never intended any such topsy-turvy construction of the statute. It is simply the subsequent irrational interpretation of the Department of Interior that would result in such a grotesque construction of the statute. These irrational contentions would perhaps be humorous if viewed from an abstract vantage point. But when Utah's school indemnity land grant would be fatally crippled by such administrative action, it is not funny at all.

It would seem highly anomalous if Congress intended to *require* the Secretary to approve *exchanges* proposed by States but to confer upon the Secretary discretion either to approve or reject the States' rights of school *indemnity selection*. Yet, Section 8 clearly directs and requires the Secretary to approve such exchanges, and the Secretary now argues that Section 7 should be construed so as to authorize him to deny school *indemnity selections* by classifying the selected land for retention in federal ownership. The result of such an argument would be that even though the Secretary would be bound to approve exchanges proposed by States, he would not be bound to approve indemnity selections to satisfy school land grant entitlements.

It is also incredible to believe that Congress would authorize the Secretary to refrain from taking any action whatsoever on school indemnity selections for nearly fourteen years, as is the case in the matter now before the Court, but would, at the same time, direct the Secretary to proceed with state exchanges "at the earliest practicable date."

As noted repeatedly above, school indemnity selections are made as a matter of right to fulfill the purpose of a solemn public trust, whereas exchanges are simply land trades which occupy a much lower status of importance and priority.

g. *Classification of Original Grants in Place*

The Secretary has placed himself in a most difficult dilemma by contending that school indemnity

selections must be classified under Section 7 of the Taylor Grazing Act in order to release them from the withdrawal for classification as implemented by Executive Order No. 6910 in 1934. If the Secretary's argument is to be accepted, it would mean that the States would not even receive title to original school grant sections in place surveyed after 1934 until the Secretary "classified" the school sections to "unlock" them and to determine whether they were suitable for disposition. This is truly a ridiculous notion.

States receive title to original school land grants in place when the lands are surveyed, and not all of the public lands have been surveyed. The Secretary claims that he must first classify as suitable for disposition all federal lands within grazing districts before such lands can be unlocked, transferred or conveyed, other than exchanges under Section 8(c). *All federal lands in Utah are located within grazing districts.* Therefore, even when sections 2, 16, 32 and 36 (the school sections) are surveyed in any particular township, under the Secretary's view he would have to proceed to "classify" these lands, first to "unlock" them from Executive Order No. 6910, and then to use broad discretion to determine whether, in his personal judgment, such school sections were suitable for disposition in aid of the common schools of the State. This is so absurd that, even though it is the Secretary's argument before this Court, it is not — and never has been — his administrative practice. School sections in place and surveyed after 1934 consistently have been patented to Utah without any sort of "classification."

But if the Secretary now were to concede that school sections in place are not within the scope of the 1936 Amendment, then he must explain some rational basis for distinguishing between the school grants in place and the indemnity selections in lieu of grants in place. And he has not been able to articulate a rational distinction. The public school trust is comprised of original grants in place *and* an equal acreage of other lands in lieu of any grants in place that are denied to the States because of federal pre-emption or private entry prior to survey. No one denies that original grants in place and indemnity selections in lieu of lost original grants are part and parcel of the same integrated school trust.

h. *Taylor Grazing Act should be Construed so as to Avoid Doubt as to its Constitutionality*

Courts favor that construction of a statute which does not raise doubts as to its constitutionality. The power which the Secretary seeks in order to classify school indemnity selections under Section 7 of the Taylor Grazing Act would be an absolute power to deny the vested indemnity selection rights of the States. This is so because the Secretary contends that he is empowered to classify any lands within a grazing district for retention in federal ownership and against school indemnity selection, and that such a classification would not be subject to judicial review because it is within his absolute discretion. Needless to say, if the Secretary is accorded such a scope of discretion, as he now desires under the guise of "classification", then the selection rights of the States would amount to very little.

The sophism advanced by the Secretary in support of his position is that the rights of the States will not be abridged or diminished at all, because they still will have their selection rights even though the Secretary denies particular selection lists by classifying the selected land for retention in federal ownership. Thus, goes the argument of the Secretary, the States can simply file new school indemnity selections, and if these new selections are also denied by the Secretary, why, then, the States can just keep on filing and filing their indemnity selections. Even though the States might never get any indemnity lands, they will always have their selection "rights".

The deceit in that argument is similar to the Secretary's references to the "selection pool" of lands from which the States may make their selections. (Secretary's petition, p. 14, and Note 13, pp. 14-15). In connection with the "selection pool" references, the deceit is that the Secretary actually argues that every acre in twelve States, including Utah, has been withdrawn and "locked up" since 1934 by virtue of Executive Order No. 6910. And so there is actually no "selection pool" at all, according to the Secretary, and there has been none for at least forty-five years. Here, the deceit by the Secretary is somewhat similar. Every acre of land in Utah is included within a grazing district (see Federal Register, Vol. 40, No. 148, Thursday, July 31, 1976, at page 32147). This means that it would be absolutely impossible for Utah to file any school indemnity selection, anywhere, without being subject to the Secretary's alleged "classification" authority. The

Secretary asserts that his scope of discretion in "classifying" selected lands is very broad, that he may consider a wide range of public interest factors in deciding upon the appropriate classification, and that if he classifies the land for retention in federal ownership it remains locked within the grasp of Executive Order No. 6910, and that such administrative action is not reviewable in the courts because there is no "law to apply" to test the legality of his decision.

Thus, under the Secretary's view of his "classification" authority under the Taylor Grazing Act, he could reject every school indemnity selection list filed by Utah during the next 100 years; the courts could never review such rejections because they would be within the lawful range of the Secretary's discretion; and Utah's public school system would be denied the trust lands "granted" by Congress upon Utah's admission to the Union.

A further practical evil that could result from the Secretary's desired scope of "classification" power and discretion is that the Secretary could "classify" for retention in federal ownership all lands in Utah, except an acreage of barren, worthless, waste lands equal to the number of acres which Utah is entitled to select as school indemnity lands. And, the Secretary says, such an action would not be reviewable because he has lawful discretion to so classify; and he also says that Utah's selection rights would not be impaired or diminished because Utah would be entitled to receive substitute acreage equal to its indemnity rights.

Utah's original school grant included sections 2, 16, 32 and 36 in each township, and would have included a balance of forest lands, prime agriculture lands, mineral lands, as well as desert and barren lands. To provide a fair balance and value in indemnity selections, Congress provided in 1958 that States could select mineral lands *if* their lost base lands were mineral in character (72 Stat. 928, 43 U.S.C. 852). But the Secretary says he has authority to cancel that statutory provision through his administrative "classification."

The public school trust was created through the bilateral actions of Utah and the United States, resulting from the congressional enactment of the Utah Enabling Act and the State's response in adopting appropriate provisions in the Utah Constitution. That bilateral compact, accompanied with the federal grant, created valuable, vested rights in the State of Utah to select school indemnity lands. The construction which the Secretary seeks of Section 7 of the Taylor Grazing Act undeniably would result in a serious and substantial impairment and diminution of the value of Utah's vested selection rights, and there certainly would be a serious question as to the constitutionality of Section 7 if it should be construed in the manner requested by the Secretary.

In *Wyoming v. United States,* 255 U.S. 489 (1921), the Court said that when a State files school indemnity selections in accordance with applicable statutory criteria, such filings:

> . . . confer *vested rights which all must respect.* (255 U.S. at 496; Emphasis added).

Further, the Court rejected the Secretary's argument that he had authority to withdraw the land from selection under the provisions of a 1910 statute, holding that such a withdrawal would be a violation of the rights of the State:

> . . . by the selection this land had ceased to be public, and . . . the act could not be construed to embrace it without working an *inadmissible interference with vested rights.* (255 U.S. at 508-09; Emphasis added).

The Court was speaking with specific reference to rights which had vested in the State upon the filing of the school indemnity selection lists, and not with respect to school indemnity selection rights where no selection lists had been filed. It is equally clear, however, that the right of selection in satisfaction of the school indemnity grant is a vested right that may be exercised in the discretion of the State. Since all lands within Utah are within grazing districts, and since the Secretary contends that he is authorized to classify all such lands, and in his absolute discretion to deny any selection lists filed, the net result would be that Utah would have no selection rights whatsoever, but would simply have to request the Secretary, in his discretion, to allow some school indemnity selections for some lands, somewhere, within the State of Utah. It is this result that would cast a serious cloud over the constitutional validity of Section 7 of the Taylor Grazing Act if the Secretary's argument is adopted.

If two alternative constructions of a statute are plausible, and one construction would render the statute unconstitutional while the other would sustain the statute as valid, then the courts will adopt the construction that will sustain the validity of the statute (*Power Brake Equip. Co. v. U.S.*, 421 F.2d 163 (9th Circ. 1970); *In re Evans*, 452 F.2d 1239 (D.C. Circ. 1971)).

Further, if the court can find a reasonable construction of a statute that will avoid reaching a question as to its constitutionality, then that course of action will be followed (*United States v. Hayman*, 342 U.S. 205 (1952); *Barr v. Matteo*, 355 U.S. 171 (1958)).

To construe Section 7 of the Taylor Grazing Act in such a manner as to authorize or require the Secretary to classify land for disposition in response to school indemnity selections is to create a serious question as to the constitutionality of the statute; whereas if the statute is construed so as to exempt and exclude school indemnity selections from the scope of the act, the constitutional difficulty is avoided. Moreover, the latter alternative is the *only* plausible construction of the statute.

i. *Mineral Rights not Affected by Taylor Grazing Act*

It is absolutely clear that nothing in the Taylor Grazing Act authorizes the Secretary to classify or dispose of the *mineral estate* in federal lands. That act applies to the surface estate only. Since 1897 the mineral resources of the United States have been subject to exclusive examination and "classification" by the

United States Geological Survey (43 U.S.C. 31(a)).

It is absolutely clear that States are entitled to make school indemnity selections of mineral lands under 43 U.S.C. 852 if the base lands are mineral in character. It necessarily follows that the Secretary could not possess authority to "classify" school indemnity selections for disposition of the mineral estate under Section 7 of the Taylor Grazing Act. The lower court emphasized this observation at page 36a, Appendix B, of the Secretary's petition.

j. *School Indemnity Statutes Liberally Construed*

The lower court construed the school indemnity statutes in such a manner as to give meaning and effect to the congressional policies and purposes as set forth therein. The Secretary now urges this Court to reverse the lower court by construing the Taylor Grazing Act in an unreasonable and irrational fashion that would frustrate and emasculate the indemnity grants which Congress made to the States.

While federal land grant statutes often are construed strictly in favor of the United States and against claimants to federal lands, that rule does not hold true with respect to school land grants. Speaking of the very indemnity provisions that are now under review, this Court said, in denying the Secretary discretion to reject a state's indemnity selection, that:

> . . . it is of further significance that this court had recognized that the legislation of Congress designed to aid the common schools of the States

is to be construed liberally rather than restrictively. *Beecher v. Wetherby*, 95 U.S. 517, 526; *Johanson v. Washington*, 190 U.S. 179, 183. (*Wyoming v. United States*, 255 U.S. 489, 508 (1921); see also 42 *Op. Atty. Gen.*, February 7, 1963).

k. *Summary*

At various places in its opinion the court below discussed and adopted virtually all of the arguments set forth above. Perhaps the most succinct portion of the opinion in this regard is where the court quotes with approval Conclusion of Law No. 6 of the trial court:

> *Conclusion No. 6:* The language of Section 7 of the Taylor Grazing Act, as amended in 1936 (codified as 43 U.S.C. 315(f)), *cannot reasonably be construed to require classification* of lands within grazing districts as proper for disposition in satisfaction of school indemnity selection lists filed under Section 852 of Title 43, U.S.C.; and there is nothing in the legislative history of the Taylor Grazing Act which indicates or suggests that Congress intended to subject school indemnity selections to the classification procedures of Section 7 of the Taylor Grazing Act. (Secretary's petition, Appendix B, pp. 29a-30a; Emphasis added)

F. *Equal Acreage rather than Equal Value*

The Secretary's sole argument in support of applying a "comparative value" criterion to school indemnity selections is Section 7 of the Taylor Grazing Act. Absent that vehicle, the Secretary has advanced no theory as to how he might escape the clear mandate

of the school indemnity selection statute (43 U.S.C. 852), which requires that selections be of equal acreage to the base lands.

As illustrated above, the lower court emphatically rejected the Secretary's attempt to invoke any "classification" authority under Section 7 of the Taylor Grazing Act to defeat school indemnity selections—and based such rejection on numerous and sound grounds. As a result, the "comparative value" argument of the Secretary is moot. For illustrative references to portions of the lower court's opinion where that argument was roundly criticized, see Secretary's petition, Appendix B, pp. 8a, 9a, 12a, 13a, 14a, 20a, 21a, 22a, 23a, and 24a.

However, it should be noted that the origin and nature of the "comparative value" criterion are examined in some detail in Section II.B. of this brief, *supra*, dealing with the Secretary's claim that Congress has acquiesced in the policy (Udall memorandum) he now desires to implement.

G. *Classification under Section 7 would not Authorize a "Comparative Value" Criterion*

The preceding section of this brief has shown that there is no basis or justification for subjecting school indemnity selections to the "classification" requirements of Section 7 of the Taylor Grazing Act, and that the lower court's conclusion to that effect was absolutely inescapable.

The trial court held that, even if it were to be as-

sumed, *arguendo*, that the Secretary had authority to classify school indemnity selections under Section 7 of the Taylor Grazing Act, he could not apply a "comparative value" criterion because the only available law to apply to such a classification was contained in 43 U.S.C. 852, which requires such selections to be based on equal acreage. The lower court approved that holding but did not find it necessary to discuss in detail that hypothetical because it saw no reasonable possibility whereby school indemnity selections could fall within the classification requirements of Section 7.

Nevertheless, the lower court did quote, with clear approbation (Secretary's petition, Appendix B, pp. 27a, 28a, 30a, 31a, 48a and 49a), the trial court's Finding of Fact No. 12 and Conclusion of Law No. 7, which are self-explanatory, and which constitute an effective alternative rejection of the Secretary's "comparative value" criterion even if he could "classify" school indemnity selections under Section 7. Conclusion of Law No. 7 is rather inclusive, yet succinct:

> *Conclusion No. 7:* Even if it should be assumed that Section 7 of the Taylor Grazing Act could be construed so as to require classification prior to disposition of land within a grazing district in satisfaction of school indemnity rights, such a classification would not be a condition precedent to the vesting of equitable title in the State of Utah as of the respective dates that the selection lists were filed; and, further, the criteria which would govern the Secretary in making such classification would be exactly the same as those which he is obligated to utilize in making his ministerial adjudication under Section 852 of

Title 43, U.S.C. This result necessarily follows from the fact that Section 7 (43 U.S.C. 315(f)) requires the Secretary, in making any such classification for lieu selections, to determine whether the selected lands are "proper for acquisition in satisfaction of any outstanding lieu . . . rights or land grant, and to open such lands to . . . selection . . . for disposal in accordance with such classification under applicable public-land laws . . . ." The Secretary is accorded no other or greater range of discretion, and no other criteria are provided by the statute. The Secretary's determination as to whether selected lands are "proper for acquisition" by the State in satisfaction of its indemnity rights would have to be measured by the requirements for such acquisition as set forth in the "applicable public-land law." The applicable public-land law for school indemnity selections is 43 U.S.C. 852, and any classification of lands made by the Secretary under Section 7 for disposition in satisfaction of school indemnity selections would, of necessity, be the same in nature, substance and range of discretion as the ministerial adjudication performed under Section 852. It is for this reason that the result would be exactly the same whether the Secretary merely conducts the ministerial adjudication of school indemnity lists required under Section 852, or whether he conducts both the adjudication under Section 852 and the hypothetical classification under Section 7 (43 U.S.C. 315(f)). Since the law does not require the Secretary to do a useless act, and since there would be no point, purpose or benefit in a separate "classification" under Section 7, the Secretary is not required to "classify" the school indemnity selection lands in this action, but should proceed merely to conduct the ministerial adjudication required by 43 U.S.C. 852. Nothing in this Con-

clusion of Law No. 7 shall be construed as an indication that school indemnity selections are within the scope of the Taylor Grazing Act; and it is expressly concluded that school indemnity selections are not within the scope of, or subject to, that Act. (Secretary's petition, Appendix B, pp. 30a-31a).

CONCLUSION

It is respectfully submitted that the Secretary's petition for a writ of certiorari should be denied.[16]

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May 18, 1979

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[16] In the lower court, the State of Idaho and the Justheim Petroleum Company appeared, separately, as **amici curiae** and presented arguments in support of the position of the State of Utah.

CERTIFICATE OF SERVICE

I, Robert B. Hansen, Attorney General, of, and counsel for, the State of Utah, and a member of the Bar of this Court, do hereby certify that two copies of the foregoing Brief by the State of Utah in Opposition to Petition for Writ of Certiorari were served upon each of the following: Solicitor General of the United States of America, Department of Justice, Washington, D.C. 20530; David H. Leroy, Attorney General of the State of Idaho, State House, Boise, Idaho 83720; and Frank J. Allen, Attorney at Law, Clyde & Pratt, 351 South State Street, Salt Lake City, Utah 84111, by mailing the same, postage prepaid, this 18th day of May, 1979, all in accordance with the Rules of this Court.

ROBERT B. HANSEN
Utah Attorney General